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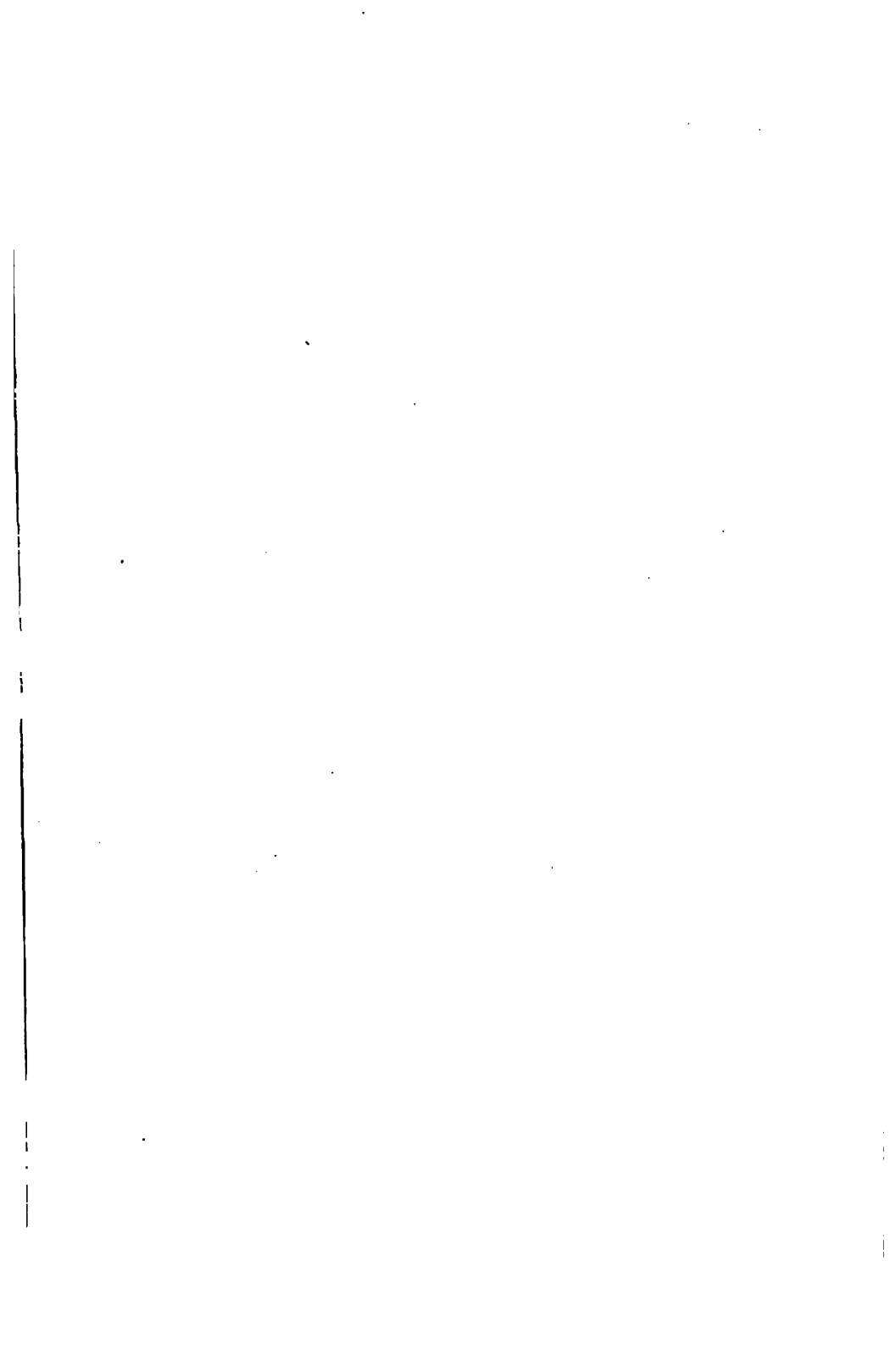
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CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 15767. Department Two. July 26, 1920.]

NANCY V. SAMPSON, *Respondent*, v. JOHN W. SAMPSON,
Appellant.¹

DIVORCE (104)—CUSTODY OF CHILD—MODIFICATION OF DECREE. A divorce decree awarding the custody of a child to the mother will not be modified upon conflicting evidence where several trial judges refused the modification and charges of improper conduct by the mother were not substantiated but were sufficiently explained.

GUARDIAN AND WARD (13)—SALES OF REAL ESTATE—CONFIRMATION. A guardian's sale of real estate, without notice, under powers granted in a decree of divorce granting the property to the child of the divorced parties, will not be confirmed upon a showing that money was needed to take care of the mortgage and taxes and that the house was often vacant and needed repairs, where the mother testified that the father interfered with renting the house and that the income derived from the amount realized on a sale would not equal the amount received by renting the property.

SAME (1-4)—REMOVAL OF GUARDIAN OF ESTATE. There was no abuse of the court's discretion in removing appellant as guardian of his child's estate after divorce granted to the parties, where the interests of the child would be benefited by a change, since the child's interests must be the chief consideration.

DIVORCE (104)—CUSTODY OF CHILD—VISITATION BY PARENT—MODIFICATION OF DECREE. A divorced father cannot complain of an order modifying a decree of divorce so as to allow him to see his child only by having it brought to the juvenile court, it being clear that

¹Reported in 191 Pac. 840.

the court on a showing of former difficulties and misunderstandings, was but trying to find the most convenient way for him to see the child regularly.

Appeal from orders of the superior court for King county, Gilliam and Tallman, JJ., and John Arthur, judge *pro tempore*, entered September 23, 1919, November 28, 1919, and August 14, 1919, in divorce proceedings. Affirmed.

Walter G. Kienstra, for appellant.

Winter S. Martin and *Ray M. Wardall*, for respondent.

HOLCOMB, C. J.—The parties to this action were formerly husband and wife, and, commencing with the proceeding in which their divorce was decreed, they have been before the superior court a number of times on account of various controversies concerning their minor child, Mildred Louise Sampson, and certain property. Appellant is guardian of the estate, and respondent guardian of the person of their child.

John W. Sampson brings this appeal from orders of the court refusing to confirm appellant's attempted sale, without notice, under a leave to sell granted in the original decree, of community real property previously decreed to belong to the child; refusing to modify the decree of divorce so as to give him the custody and guardianship of the child, or to give him the right generally to sell the property for the child's benefit, should the necessity arise; and modifying the decree of divorce so as to prohibit appellant from seeing the child except through the medium of the juvenile court, and removing him as guardian of the child's estate.

The parties intermarried in 1904, in the state of West Virginia, and have, since 1906, resided in King

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county, Washington. The minor child is the only issue born of the marriage. The real property consists of two lots in the city of Seattle and the structures thereon, these being a five-room cottage on the front of the premises and a small three-room cottage, originally intended as a woodshed, on the rear of the lots. Respondent and the child were living in the smaller house during most of the time the difficulties of the parties were before the court; while the larger house, on the front of the lots, was rented and the rental used to make payments on a mortgage and for taxes. The property seems to have been acquired largely by the earnings of appellant, who is a laborer. The court found the real property to be of the value of about \$2,000, with a mortgage thereon of about \$200, and the household goods and equipment to be worth about \$500.

Counsel for appellant suggests that the following three questions are to be determined: Whether respondent is morally fit to have the custody of the child; whether the court should have confirmed the sale of the real property attempted to be made by appellant; and whether the court should have removed appellant as guardian of the child's estate.

A careful scrutiny of the record reveals much testimony in which there is sharp conflict on practically every question. Assertions on the one side are met with denials on the other; and, as is too often true in such cases, there are many accusations and recriminations. Several affidavits were filed to substantiate certain allegations made.

Since the original decree of divorce, the mother has had custody of the child, and, although several judges of the trial court saw the parties and heard the testimony in the various proceedings that were instituted,

none of them saw fit to modify the original decree to the extent of taking the child away from its mother and giving it to the father. True, respondent was charged with certain acts of an improper or immoral nature, but we do not think the charges were substantiated by the evidence. It was alleged that she remained away from home late nights and left the child alone in the house; but respondent explained that there were times when, because of appellant's failure to promptly pay the monthly sums of money toward the support of the child, which the court had ordered him to do, she found it necessary to go out nights to work in various capacities and places; and her testimony went to show that, on such occasions, the child was left with a neighbor and was well cared for.

In support of his contention that the sale of the real property should have been confirmed, appellant urged the necessity of caring for the mortgage, taxes and probable assessments for local improvements, such as paving, grading and sewers; that the house was often vacant; that it was in need of repairs which would be expensive; and other reasons why it would be advisable to sell the property and devote the proceeds to the care of the child. But respondent claimed that appellant by his acts interfered with the renting of the house when she had a tenant ready and willing to pay a good rental; and that it would be poor business policy to sell the property and reinvest the money derived from its sale, when the return on such investment could not possibly equal the sums that ought to be secured by renting the property. She insisted that such income would enable her to take care of taxes and similar expenses. The trial court was evidently of the same opinion.

In regard to the removal of appellant as guardian of his child's estate, it is argued that this was done by

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the court contrary to appellant's wishes and without any proper showing that a change would be agreeable to him. However, there is evidence sufficient to justify the court in finding that the interests of the child would best be safeguarded by putting the guardianship of her estate in the hands of some one other than appellant; and, after all, the child's interests must be the chief consideration. We are not convinced that the court abused its discretion in this respect, or that the appointment of a new guardian for the child's estate is likely to prove in any way detrimental to either the child or appellant.

On the question of appellant's objection to being allowed to see his child only by having it brought to the juvenile court, it is clear that the trial court, in view of testimony showing that, on several occasions, attempts at visitation had failed because of difficulties and misunderstandings, was but endeavoring to find the most convenient way for appellant to see his child regularly.

We are unwilling, nor do we think it is necessary, to set out in this opinion one or two more or less disagreeable details appearing in the record of this case, as in so many cases of a similar nature. No good can be done by the recital in an opinion of this kind of allegations concerning the frailties of human nature, especially when the truth of some of them must of necessity be doubtful. Each case like this is usually dependent upon its own particular facts for the proper solution of the problems it presents. The trial court has the advantage of an environment which no record can exactly reproduce here. This case is before us for trial *de novo* and we have tried the whole case upon its merits. Our perusal of the record has failed to convince us that the evidence was insufficient to support the conclusions reached by the trial court.

We find no error, and the orders appealed from are accordingly affirmed.

FULLERTON, MOUNT, TOLMAN, and BRIDGES, JJ., concur.

[No. 15785. Department One. July 26, 1920.]

ROBINSON, THIEME & MORRIS, *Appellant*, v.
H. C. WHITTIER *et al.*, *Respondents*.¹

USURY (11)—WHAT CONSTITUTES—AGREEMENT FOR SERVICES TO BE RENDERED BY LENDER. A charge of \$1,000 for a loan of \$2,250, which was included in notes of the borrower and was to bear interest, is an usurious transaction, although the parties signed an instrument which provided for services to be rendered by the lender, such contract being indefinite as to time and kind of services rendered, and it appeared that the services actually rendered were of no practical value and that the agreement amounted merely to a shift or device to cover illegal interest on money loaned.

CHATTEL MORTGAGES (18, 24)—VALIDITY—AFFIDAVIT AND RECORDING—EFFECT OF REACKNOWLEDGMENT. A chattel mortgage which was not filed within ten days from the time of execution, though duly acknowledged and accompanied by the affidavit of the mortgagor, is not validated by a reacknowledgment and a redating and filing, without a resigning or the making of an affidavit of good faith by the mortgagor, since the statute, Rem. Code, §§ 3660, 3661, requires a strict compliance with all essential requirements, without which the mortgage can have no validity as against creditors.

SAME (46)—AFFIDAVIT AND RECORDING—VALIDITY—EFFECT OF POSSESSION BY MORTGAGEE. In such a case, it cannot be claimed that the taking possession of the property by the mortgagee before the rights of creditors accrued would validate the mortgage, the evidence merely showing that certain chattels were removed by an agent of the mortgagee at the direction of the mortgagor and were wrongfully taken to a place other than that intended, but not under the care of the mortgagee, and that he knew nothing of the removal of the goods and never had possession.

Appeal from a judgment of the superior court for King county, Ronald, J., entered September 15, 1919, upon findings in favor of the defendants, in an action

¹Reported in 191 Pac. 763.

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on promissory notes and to foreclose a chattel mortgage, tried to the court. Affirmed.

Roberts & Skeel and *L. B. Schwellenbach*, for appellant.

Gates & Helsell and *Van Dyke & Thomas*, for respondents.

MITCHELL, J.—This is an action upon four promissory notes aggregating \$3,250, and to foreclose a chattel mortgage to secure the same, given by H. C. Whittier to the plaintiff. Fairbanks-Morse & Company and Mill & Mine Supply Company were made parties defendant because they had taken possession of certain of the chattels covered by the mortgage. Defendant Whittier answered with the defense of usury, and the other defendants pleaded usury and a failure to file the chattel mortgage within ten days after its execution and delivery. Upon the trial, the defenses were satisfactorily proved, and from the judgment to that effect, plaintiff has appealed.

The notes, in the total sum of \$3,250, bearing eight per cent interest per annum, were dated August 2, 1918, and were made payable at several dates from August 15 to October 15, 1918. It is conceded that Whittier received only \$2,250. Appellant claims the transaction was not usurious and attempts to vindicate the additional \$1,000 (which by being included in the notes was to bear interest) upon the claim that it was intended as pay to appellant for services to be rendered, according to the terms of a separate writing therefor signed by Whittier at that time. Whittier was engaged in a small logging business in King county. He became financially embarrassed. He applied to appellant for a loan, explaining his condition. Appellant was engaged in the real estate, loan and in-

surance business in Seattle. Whittier asked for a loan of \$2,000, but finally decided on \$2,250. George R. Thieme, who conducted the negotiations for the appellant, made Whittier come back several times, and finally Whittier told him that, rather than fall down on the proposition, he could afford to and would pay \$1,000 for the loan. Then the notes and mortgage were prepared and given; and at the same time, upon requirement of the appellant, there was signed by both parties the written instrument in question, wherein appellant agreed "to visit the timber operations of the party of the first part from time to time, inspect the operations, advise regarding purchase of equipment, cooperate in making of sales, and generally give first party the benefit of the business judgment and experience of the party of the second part."

In support of the legality of this agreement, it is argued by appellant that, if the circumstances attendant upon the making of a loan may require any kind of services to be rendered to the borrower, for such services rendered in good faith the lender may properly require compensation, in addition to a reasonable amount of interest upon the money loaned. The argument may be conceded, since the proposition contained therein admits the quality or test of good faith. A money lender, bent upon violating the rule of public policy contained in the statute against usury, not infrequently resorts to the subterfuge of a contemporaneous contract for pay for services rendered or to be rendered by the lender, or for profits earned upon a transaction other than the making of the loan, to conceal the true nature of the transaction. The form of the agreement is immaterial; and as was written upon this subject, in *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998:

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“But we have steadfastly held that any device, however specious, to defeat the law will not be tolerated, and this, too, whether it is made the subject of proof or is apparent from the admitted facts.”

The contract, couched in vague and general terms as to the kind of services to be rendered, is indefinite as to time. If measured by the length of time the notes were to run, then appellant was to receive \$1,000 and interest out of ten weeks' output of this small logging business. Whittier failed and ceased logging operations about the last of August. In proof of the good faith of the contract for services, appellant testified to what it actually did. There is some dispute in this regard, but we are satisfied, as evidently the trial court was, that it amounted to practically nothing. Thieme, who looked after the matter for the appellant, was inexperienced in conducting logging operations. He visited the camp two or three times before it closed down; for what purpose it is not shown, certainly he neither called for nor upon Whittier upon either of those visits. Whittier testified he had a foreman at the camp and that there was nothing for appellant to do, and that it did not perform any services there. The market for logs was good, with prices going up. Appellant, by one of its officers, claims to have examined a motor truck to be used at the camp about the time the loan was made, but the record shows Whittier had already purchased it. After the camp was shut down, while it is true appellant became active in the matter of the disposition of the logs, its manifest purpose in so doing was to get as much money as possible out of a bad situation, to apply on the loan. Whittier testified the \$1,000 “was for interest on the loan.” True, that, at the time of having the contract written, he made a statement to the contrary, but we are convinced he did so under pressure of the plan adopted

by the appellant in making the loan. We are satisfied the means employed amounted to a shift or device to cover illegal interest on money loaned and that the transaction was usurious.

Appellant also contends, contrary to the finding of the trial court, that the chattel mortgage was filed within ten days from the time of the execution thereof. The mortgage, to be good against respondents Fairbanks-Morse & Company and Mill & Mine Supply Company, who were creditors, must, under § 3660, Rem. Code, have been accompanied by the affidavit of the mortgagor that it was made in good faith, etc., acknowledged and filed within ten days from the time of the execution thereof, in the office of the county auditor. The facts are that, at the time of making the notes, August 2, 1918, Whittier executed and delivered the chattel mortgage, duly acknowledged, and accompanied by his affidavit of good faith, etc. Appellant held it until August 20, 1918, without filing it with the county auditor. On August 20, 1918, Mr. Thieme called Mr. Whittier into his office, told him he had neglected to file the mortgage, and had an understanding with him which was put in writing and signed by Mr. Whittier. The writing, addressed to the appellant, refers to and identifies the chattel mortgage and says:

“I hereby consent to said mortgage being re-dated August 20, 1918, and acknowledgment being re-taken as of this same date.”

Then, appearing before a notary public, Mr. Whittier, without signing or resigning the instrument, or any part of it, and without making any affidavit of good faith, etc., simply reacknowledged the mortgage. The notary public changed the date to August 20, and on August 23, 1918, appellant filed the mortgage in the office of the county auditor. The instrument, or any

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part of it, has not been in the possession of the mortgagor since it was executed and delivered by him on August 2, 1918. It will be noticed that the statute, § 3660, Rem. Code, makes no difference as to the class of creditors. Those protected are all the creditors—"both existing and subsequent, whether or not they have or claim a lien upon such property." The statute is plain, in requiring the making of the mortgage proper, that it be accompanied by the affidavit of good faith, that it be acknowledged and filed within ten days from the time of the execution thereof. Each and all are essentials, without which it can have no validity against creditors. Section 3661 of the code also provides: "Every such instrument, within ten days from the time of the execution thereof, shall be filed"; that is, an instrument made in observance of and containing the formalities mentioned in the former section. It is not contended that Mr. Whittier was actually sworn on August 20 as to the good faith of the transaction. That he did not intend his former affidavit to be revived or repeated by his conduct on August 20 is made manifest by his writing to the effect that the mortgage be redated and the acknowledgment retaken on that date. The oral proof is to the same effect. He specified certain parts of the old instrument and thereby necessarily excluded another part.

It is claimed by appellant, however, that the affidavit, having been actually made on August 2, was sufficient under the statute. Our attention is called to the case of *Allen v. American Loan & Trust Co.*, 79 Fed. 695, wherein the chattel mortgage statute of this state, as it then existed, was considered. In that case, an instrument which covered both real and personal property had been executed without an affidavit of good faith and recorded only as a real estate mort-

gage. Later the mortgagor executed an affidavit of good faith, caused the same to be attached to the mortgage, and it was thereafter duly recorded as a chattel mortgage. The court held the legal effect of what was done equal to a rewriting, resigning and reacknowledgment of the instrument. That is, by his act of attaching a new instrument to the old one and delivering it, he thereby impliedly made the instrument, in all of its parts, a new one as of that date. The present case is distinguishable, for here nothing new was attached to the instrument, nor was there any new delivery, and by a familiar rule of construction, Whittier, by his writing and conduct pursuant thereto, excluded the remaking or redating of the affidavit of good faith.

Further, appellant relies upon the cases of *Engle-right v. Annesser*, 19 Ohio C. C. 406, and *Perry v. Rut-tan*, 10 U. C. Q. B. 637. Each of those cases considered a chattel mortgage statute that required the mortgagee to make the affidavit of good faith, and in each case the affidavit had been made prior to filing, but on a date different from that of the execution of the mortgage. In each case it was contended by the creditor that a proper construction of the statute required the mortgagee to make the affidavit at the time the mortgage was executed. In each case the statute, different from ours, contained no provision with reference to the time within which the instrument should be filed after it was executed, acknowledged and accompanied with the affidavit of good faith. In each case the decision was against the creditor. In the Ohio case, the court observed that the statute was silent as to when the affidavit should be made, while in the Upper Canada case, where the affidavit was made some days later than the mortgage and just before filing it, it was aptly said that such course was calculated to advance,

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rather than defeat, the object which the legislature had in view. If an affidavit of good faith by the mortgagor which antedates the filing by a period of time in excess of that provided by the statute within which the instrument must be filed is to be held sufficient, then the object which the legislature had in view would be defeated rather than advanced. The subject is covered by the statute, the terms of which must control.

Lastly, it is contended that, even if the mortgage was invalid, the taking of possession of the property by appellant before any rights of respondent creditors accrued would cure such invalidity. We do not find that the appellant ever took possession of the property involved, nor does the finding of the trial court upon that subject so declare. Upon closing down the logging camp, appellant's drayman, for, and under the directions of, Mr. Whittier, took certain chattels from the camp to be stored, as directed by Mr. Whittier, in Seattle, looking to an adjustment of his affairs among all the creditors. On arriving in Seattle, the drayman, contrary to the instructions of Mr. Whittier, and surreptitiously, diverted the things to some place at or near Monroe, Washington, not under the care of appellant. The next day, upon learning of the location of the articles, Mr. Whittier, with respondent creditors, took possession of the articles, and at that time delivered to each of the respondent creditors those articles that were purchased from him and for which he had not been paid. Appellant's testimony shows it knew nothing of, and did not authorize, the removal of the goods from the logging camp. Under these circumstances, there was no possession by appellant, hence the rule relied on has no application here.

Judgment affirmed.

HOLCOMB, C. J., MAIN, TOLMAN, and PARKER, JJ.,
concur.

[No. 15727. Department Two. July 26, 1920.]

JOHN H. WALLACE *et al.*, Appellants, v. ELLEN WALLACE
et al., Respondents.¹

EJECTMENT (48, 50) — IMPROVEMENTS (4) — SET-OFF — LIEN FOR IMPROVEMENTS—ADVERSE CLAIM OF TITLE. Under Rem. Code, § 797, allowing the defendant in ejectment to recover the value of improvements placed upon property adversely held in good faith under claim of right, there can be no lien for improvements placed on property by permission of the owner for the benefit of defendant while occupying the premises by sufferance without any claim of right.

Appeal by plaintiff from a judgment of the superior court for Yakima county, Holden, J., entered May 21, 1919, quieting plaintiff's title, but adjudging defendants a lien for the value of improvements placed upon the property, tried to the court. Reversed.

W. A. Funk and *Geo. H. Rummens*, for appellants.

O. L. Boose, for respondents.

MOUNT, J.—This action was brought by the appellants to quiet title and recover possession of a certain tract of land in Yakima county. The complaint is in the usual form. The defendants answered, denying title and right of possession in the plaintiff, claiming an undivided one-half interest in themselves. On these issues the case was tried to the court without a jury, and resulted in findings to the effect that the plaintiff was the owner and entitled to the possession. Thereafter the defendants applied to the court for leave to reopen the case and introduce further evidence. This motion was granted and the court received further evidence relating to the value of improvements which had been placed upon the property, and finally entered

¹Reported in 191 Pac. 793.

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a decree adjudging that the plaintiff was the owner of the property and entitled to the possession thereof, but that the defendants were entitled to a lien upon the property for \$1,500, the value of improvements placed thereon by the defendants. The plaintiff has appealed from that part of the decree which adjudged that the defendants were entitled to a lien of \$1,500 on account of improvements placed upon the land.

The facts in the case, as shown by the evidence, are substantially as follows: The plaintiff is the son of Ellen Wallace and John A. Wallace, now deceased. He is the brother of the other defendants. In the year 1903, the plaintiff John H. Wallace and one Richard Griffiths purchased the land in controversy. John H. Wallace at that time was a single man, living with his parents in the town of Cle Elum. He afterwards purchased the interest of Mr. Griffiths. John H. Wallace and his father were both working in the coal mines at that place. The father was injured and was unable to work. John H. Wallace then told his father and mother that they might move upon this tract of land and occupy it as a home until the family was grown up. His father and mother and family, in 1904, moved upon the property. This property at that time was in a raw state, except six acres which had been planted to alfalfa. There were no buildings of any consequence upon the land. When the family moved upon the land, they built a dwelling and some small buildings and afterwards improved all the land by putting it into cultivation. After they had lived there for a short time, John A. Wallace, the father of the appellant, died. The family continued to reside upon the land and improved and cultivated it, without paying rent, until the year 1914. After that time, the appellant received one-half the crop as the rental value of

the property. In the year 1918, when all the children were of age except one, who was yet a minor, some disagreement arose between the appellant and his mother and brothers in regard to the manner in which the farm was cultivated. Thereupon the appellant leased the land to another party and the respondents refused to give possession to the other party and this action was brought, with the result as hereinbefore stated.

The single question in the case is, Are the respondents entitled to recover the value of the improvements placed upon the property during the time they were in possession? It is plain from the evidence that not until this action was brought did the respondents claim title thereto. Their sole defense to the complaint was that they were owners of an undivided one-half interest. When the court found that they were not owners, then they sought to subject the property to a lien for alleged improvements. The statute, at section 797, Rem. Code, provides that, in an action for the recovery of real property, upon which permanent improvements have been made by those holding in good faith under color or claim of title adversely to the plaintiff, the value of such improvements must be allowed as a counterclaim to the defendants. While it was claimed upon the original trial that the respondents owned an undivided one-half interest, it is plain from the evidence that such claim was not made in good faith under color or claim of title adversely to appellant. They knew, from the time they went into possession of the property until this action was brought, that they were there by the kindness of the appellant. They knew the condition of the property at the time they went upon it. They knew it would require improvements to be made before the property could produce a

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living for them. They made improvements for their own use and occupied the property for a period of about twelve years without paying any rent therefor. It is conceded that the appellant paid all the taxes and at least paid something toward the improvements. The improvements which were placed upon the property were for the use and benefit of the respondents. During both trials the appellant made no claim to the little dwelling which was placed upon the property, but stated that he had no objection to his mother removing the dwelling. We are satisfied from all the evidence in the case that these improvements were not placed upon the property because respondents claimed in good faith to own the property, but were placed there simply for their use during the time they should remain in possession of the property.

The rule is stated in 22 Cyc., p. 8, as follows:

"It is now well settled that where an improvement, such as a building, is put upon the land of another by his permission, under an agreement or understanding that it may be removed at any time, it does not become a part of the real estate, but continues to be personalty and the property of the person making it; and it is immaterial what is the purpose, size, material, or mode of its construction. And if the improvement is made by the owner's permission, an agreement that it shall remain the property of the person making it is implied in the absence of any other facts or circumstances showing a different intention. But this is not a necessary implication from such permission, and will not be drawn when a different intention is indicated by an express agreement between the parties, or from the interest of the party making the improvement or his relation to the title to the land."

See, also, *Phillips v. Reynolds*, 20 Wash. 374, 55 Pac. 316, 72 Am. St. 107.

We think the record is clear to the effect that these improvements were made upon this property by con-

sent of the appellant for the use and benefit of the respondents while upon the land. This being so, the trial court improperly allowed a lien upon the land for the value of the improvements, which consisted of a dwelling house and some outhouses of no particular value to the land. The trial court was right upon its first judgment, to the effect that the respondents should have a certain time in which to remove the dwelling house which they had constructed upon the land. The appellant made no objections to this claim—in fact, conceded the right of the respondents, if they desired, to remove the dwelling.

The part of the judgment appealed from is therefore reversed, and the cause remanded with instructions to the lower court to enter a decree giving the respondents a reasonable time in which to remove the building, if they desire to do so.

HOLCOMB, C. J., TOLMAN, FULLERTON, and BRIDGES, JJ., concur.

[No. 15774. Department Two. July 28, 1920.]

B. E. MOTT, *Doing Business as Mott Candy Company*,
Appellant, v. H. M. JOHNSON, *Defendant*,
J. V. PAYNE, *Intervener, Respondent*.¹

CHATTEL MORTGAGES (13)—PROPERTY INCLUDED—DESCRIPTION IN MORTGAGE. A chattel mortgage describing the property as all furniture and fixtures contained in a certain building, etc., and all merchandise contained therein "and more especially described as follows," and given to secure the full purchase price on the sale of a pool hall and cigar store, will be held to meet the intent of the parties as including all property in the building, which included property used in the business in addition to that specifically described in the mortgage.

Appeal from a judgment of the superior court for Yakima county, Taylor, J., entered July 26, 1919, in

¹Reported in 191 Pac. 844.

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Opinion Per **TOLMAN, J.**

favor of the intervener, adjudging the priority of a chattel mortgage lien, tried to the court upon stipulated facts. **Affirmed.**

Davis & Morthland, for appellant.

Frank J. Allen, for respondent.

TOLMAN, J.—On December 19, 1918, the defendant, H. M. Johnson, purchased a pool room and cigar store in the town of Granger, for the agreed price of \$1,750, paying nothing down, but giving his note for the full purchase price, and securing the same by a duly executed chattel mortgage in which the property pledged is described as follows:

“All the furniture and fixtures contained in the building known as the Fred R. Hawn building and located on the east 25 feet of lots 13, 14, 15 and 16, in block 22, Town of Granger, Washington, together with all merchandise therein contained and more especially described as follows, to wit: Four billiard and pool tables with cues, balls and racks; one stove and one set scales; counters both front and back; all chairs. Also all of the stock of goods, wares and merchandise, including candies, cigars, tobaccos and fountain goods;”

which mortgage was duly filed of record. Thereupon Johnson went into possession of the going business so purchased, which then included not alone the items specified in the mortgage, but contained considerable additional furniture and fixtures. On March 22, 1919, appellant began this action in the court below against Johnson, sued out a writ of attachment, and caused it to be levied upon all of the property in the place of business referred to. Shortly after the levy, respondent intervened, and by his complaint in intervention set up the assignment of the note and chattel mortgage by the mortgagee therein named to the

Union Bank of Granger, and a like assignment, both for a valuable consideration, by the bank to himself, and sought the foreclosure of the chattel mortgage as a first lien upon all of the property which had been attached. At the trial, respondent abandoned his claim to the stock of merchandise in trade, and by stipulation the essential facts were agreed upon. From a judgment in favor of respondent, establishing and foreclosing his lien upon all of the property except the merchandise, this appeal is taken.

It appears that, at the time of the levy of the attachment, there was property in the storeroom and used as a part of the business (which was so there and used when the mortgage was made), in addition to the articles specifically described in the mortgage, as follows:

“One piano player, one draught stand, one milk-shaking machine, one cash register, glass dispenser, roll top desk, syrup bottles, ice cream cabinet, cigar case (6 feet in length), candy case (4 feet in length), four-foot show case, six-foot bottom case, six-foot counter show case, and four large palms.”

Appellant's contention here is that the articles last described were not affected by the mortgage, and that the language used, “all furniture and fixtures,” is limited by the words “and more especially described as follows,” to the specific articles enumerated. The question is not altogether as simple as might appear at first thought. A general description has, in many jurisdictions, been held sufficient, except perhaps as to after-acquired property, when the intention that it shall so apply is not made clear and certain; and had the scrivener been content to stop with the first clause of the description, we would have no difficulty in holding with the trial court. Had he continued by words

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clearly limiting the general description, as "more particularly set forth and described in the following schedule," we would be equally clear that the judgment is wrong, but as it reads, the intent cannot be clearly gathered from the instrument itself. Chief Justice Cooley in *Willey v. Snyder*, 34 Mich. 60, says:

"Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time. They are not prepared for strangers, but for those they are to affect; the parties and their privies. A subsequent purchaser or mortgagor is supposed to acquire a knowledge of all the facts, so far as may be needful to his protection, and he purchases in view of that knowledge."

See, also, *Furgerson v. Twisdale*, 137 N. C. 414, 49 S. E. 914; *Miller v. Hart*, 32 Hun (N. Y.) 639; *Harding v. Coburn*, 53 Mass. (12 Met.) 333, 46 Am. Dec. 680.

If, then, we may interpret this description in the light of the facts which were in the minds of the parties at the time, it is self-evident that the mortgage, being given to secure the full purchase price of all property in the building, the parties intended that it should cover all that property, and except as they failed to include essentials to perfect their intention as to the merchandise, the mortgage should be held to cover all of the property intended.

Judgment affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15861. Department Two. July 28, 1920.]

EBB SCHROCK, *Appellant*, v. E. F. SCHROCK,
Respondent.¹

COMPROMISE AND SETTLEMENT (9) — EVIDENCE — SUFFICIENCY. A final settlement and adjustment of all matters relating to certain trades in real estate is sufficiently shown by evidence that plaintiff was paid sums for his services in making the trades and for expenses incurred in farming the land before the first trade, and that thereafter in an action against the defendant brought by a third party claiming a large sum due him in the transaction, the plaintiff positively testified that the sums paid him were given in full and final settlement of all that was due, although now testifying that part of the sums paid was an advance merely, and that there was a mutual mistake in failing to consider certain payments and personal property involved in the transaction.

Appeal from a judgment of the superior court for Okanogan county, Carey, J., entered July 10, 1919, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

F. K. P. Baske, for appellant.

Danson, Williams & Danson (*R. E. Lowe*, of counsel), for respondent.

TOLMAN, J.—Appellant, who was plaintiff below, is a nephew of the respondent, and sues to recover one-half of the profits which he alleges accrued from certain trades in real estate. From a judgment denying him any recovery, he appeals.

As we see it, the questions involved are of fact only, and the following is either admitted or fairly established by the evidence:

In 1914, respondent owned a large tract of land in Adams county, Washington, subject to a mortgage for \$30,000, which had theretofore been farmed unprofit-

¹Reported in 191 Pac. 768.

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ably by another nephew, W. D. Schrock. In March of that year, appellant proposed, and respondent agreed, that appellant should go upon the land, care for and farm it, out of the proceeds pay the interest on the mortgage, retaining the remainder of the income for himself, and that he should sell or trade the land, when opportunity offered, for as much as possible above the mortgage debt. Appellant contends that, in the event of sale, it was agreed that the amount realized above the mortgage should be divided equally between them; while respondent denies any such agreement, and contends that, while it was understood that appellant should be compensated if he brought about a sale or exchange, no percentage or amount was named or agreed upon.

Appellant purchased from respondent the live stock, machinery and tools on the place for \$6,400, and paid therefor by executing deeds to certain lands, valued at \$3,000 more than the purchase price of the personal property. These deeds do not appear to have been delivered, but were placed in a bank, presumably to be delivered when respondent paid the \$3,000 boot money. Following the making of these arrangements, appellant went upon the land and proceeded to put in a crop and to summer-fallow, at an expense of approximately \$3,000. Thereafter in May of the same year, with the consent and approval of respondent, appellant traded the equity in the Adams county land, and the personal property used in connection therewith, for an equity in a tract of land in Montana, paying a bonus on the trade of \$5,000 in cash, which was supplied by respondent. Respondent then surrendered to appellant the deeds in escrow of the land which had figured in the purchase of the personal property (never having paid the \$3,000 boot money on that

transaction), and thereafter another trade was made through the efforts of appellant by which the Montana land was exchanged for land in Lincoln county, Washington, which was subject to a mortgage of upwards of \$25,000. Title to the Lincoln county land was vested in respondent, who purchased and paid for certain personal property thereon and entered into exclusive possession.

In November, 1914, the parties made some kind of an adjustment which respondent contends was a final settlement of all of these matters, in which \$6,000 was allowed for appellant's services in making the two exchanges, and \$1,800 was added thereto, as respondent claims, for the \$3,000 expended by appellant in putting in the crop and summer following the Adams county land before the first trade, less \$1,200, interest on the mortgage on that land, which by agreement appellant should have paid, and a note for \$7,800; the amount thus arrived at was given by respondent to appellant, which was afterwards admittedly paid.

Appellant made no further claims for some years thereafter, during which time the other nephew, W. D. Schrock, waged an unsuccessful action against the mutual uncle for a large sum claimed to be due him in the transaction, upon the trial of which case appellant testified squarely, upon apparently full understanding of all the facts, that the \$7,800 note, heretofore referred to, was given to him in full and final settlement of all that was due him in this transaction. He now testifies and strenuously contends that the \$6,000 included in the \$7,800 note, for his services, was an advance only; that it was then agreed that the remainder of his half of the profits should be paid when the Lincoln county land was sold, and ingeniously, we think, he attempts to explain away certain matters and ad-

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vances the theory that the personal property included in the first trade was his, was traded in at a valuation of \$19,200, although, at the time he purchased it two months before, it was valued at \$6,400; that certain payments made to him by respondent were for the purpose of equalizing their interests in the Montana land because of such valuation on the personal property, and he here seeks recovery of upwards of \$22,000 as his share of the profits of the sale of the Lincoln county land, plus upwards of \$14,000, his share of the profits derived from farming the land before it was sold, and, in the alternative, he contends here that, if a final settlement was in fact made, then there was a mutual mistake, in that the parties failed to take into account the personal property and the cash payment which went into the purchase of the Montana land, and therefore the settlement should be disregarded or set aside.

After a careful study of the record, we are abundantly satisfied that the findings of the trial court are supported by a preponderance of the evidence; that a final settlement was made, without any element of mistake entering therein, and that both parties are bound thereby. The judgment is affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15886. Department One. July 28, 1920.]

ALBERT ERICKSON, *Respondent*, v. SARAH KENDALL,
Appellant.¹

MORTGAGES (95) — ASSIGNMENTS — PAYMENT TO AND RELEASE BY ASSIGNEE—FAILURE TO RECORD ASSIGNMENT. Since the enactment of Rem. Code, § 8781, requiring the recording of assignments of mortgages, a *bona fide* purchaser of the property who assumed the mortgage is not bound to take notice of an unrecorded assignment of a mortgage which he had assumed and agreed to pay.

SAME. Where an assignee of a note and mortgage failed to record the assignment and appointed the mortgagee as her agent to collect the interest and several times authorized the mortgagee to extend the time for payment during a period of nine years, the assignee, as the one of two innocent parties who must suffer, is estopped to assert as against a *bona fide* purchaser of the property that the mortgagee had no right to collect the principal and agree to satisfy the mortgage of record.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered February 7, 1920, in favor of the plaintiff, in an action to cancel a mortgage, tried to the court. Affirmed.

Roberts & Skeel and *J. J. Geary*, for appellant.

Milo J. Loveless, for respondent.

HOLCOMB, C. J.—On June 28, 1910, Harley H. Wells and wife, being then the owners of lot 22, block 9, Madison Park addition to Seattle, borrowed \$750 from one P. C. Ellsworth. To secure the indebtedness, evidenced by a note, they gave Ellsworth a mortgage on the property. This mortgage, which was payable two years after date, or June 28, 1912, was recorded on July 1, 1910. On July 8, 1910, Ellsworth assigned the mortgage to Dr. Sarah Kendall, which assignment was not recorded until nearly nine years later, or Febru-

¹Reported in 191 Pac. 842.

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ary 21, 1919. On September 27, 1911, plaintiff purchased the property from Wells and wife, the consideration being \$1,600, \$850 of which was payable in monthly payments, the grantee to assume the mortgage of \$750. Ellsworth at this time informed Erickson that he was the owner of the mortgage. From the date of the maturity of the mortgage debt, Erickson asked and secured of Ellsworth several extensions of the mortgage, final payment being made by Erickson to Ellsworth on January 8, 1919, when Ellsworth gave Erickson a receipt showing payment in full of the mortgage, and written on the receipt were the words "To be satisfied of record." He also assured Erickson at that time that the mortgage would be satisfied of record within ten days. On February 19, 1919, Ellsworth went into bankruptcy, and two days later Dr. Kendall filed of record her assignment of the mortgage.

Plaintiff brought this action for satisfaction and cancellation of the mortgage, on the theory that payment had been made to Ellsworth. From the judgment of the court in favor of plaintiff, defendant has appealed.

From the evidence it appears that respondent did not know that the mortgage had been assigned to appellant. It further appears that Ellsworth was the trusted agent of appellant, who had from time to time invested a considerable amount of money in real estate mortgages through him; that she received payments of interest through him, and had in a number of instances received payment of the principal of other mortgages through him. Appellant admits that, in every case, she took possession of the note, mortgage and assignment; that, when a mortgage would become due her, Ellsworth, as her agent, would notify her that

the debtor was about to pay, and she would then go to his office with the note, mortgage and assignment and deliver those papers, together with formal satisfaction of the mortgage, to Ellsworth, upon receiving payment either in money or in the form of a new mortgage. No part of the principal of the mortgage in question was ever paid by Ellsworth to appellant.

When respondent bought the property in September, 1911, he caused an abstract of title to be prepared and had it examined by a firm of attorneys, who informed him that their examination of the abstract disclosed that title to the property was at that time in Harley H. Wells, and that it was subject to the mortgage of Ellsworth and certain special assessments. In having the title searched, respondent did all that the ordinary person would have done, or could have been expected to do, under the circumstances. It will be remembered the mortgage was assigned to appellant sometime in July, 1910, more than a year before respondent purchased the property. If, at any time within that period, appellant had filed her assignment of record, that fact would have appeared in the abstract which respondent procured and would have been notice to him that she was the owner of the mortgage. Section 8781, Rem. Code, provides that:

“All deeds, mortgages, and assignments of mortgages, shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid as against *bona fide* purchasers from the date of their filing for record in said office; and when so filed shall be notice to all the world.”

Prior to the enactment of the above statute, we held in *Howard v. Shaw*, 10 Wash. 151, 38 Pac. 746, and in *Fischer v. Woodruff*, 25 Wash. 67, 64 Pac. 923, 87 Am. St. 742, as contended for by appellant, that record of assignments of mortgages not being required, a *bona*

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fide assignee of a note secured by mortgage, by an unrecorded assignment, would not be estopped from asserting the validity of his mortgage lien against a subsequent incumbrancer for value and in good faith. But clearly that is not the law since the passage of § 8781, Rem. Code. And in *Gottstein v. Harrington*, 25 Wash. 508, 65 Pac. 753, we so held, and further said:

“It would seem from the above provision of the statute that the respondents were not legally bound to look beyond the records in the office of the county auditor for assignments of the mortgage there of record, and that they had a perfect right to presume that no such assignment had been made.”

To the same effect is *Christenson v. Raggio*, 47 Wash. 468, 92 Pac. 348, a case relied upon by appellant; although that case depended upon actual notice of an unrecorded assignment of a mortgage before purchase and payment of the purchase price by a *bona fide* purchaser who caused the assignment to be recorded and the mortgage then satisfied of record by that assignee, there being another unrecorded assignment of the same mortgage extant of which the purchaser had no notice or knowledge, by record or otherwise. That Erickson remained in ignorance of the fact that appellant was the real owner was due to her failure for nearly nine years to record Ellsworth's assignment of the mortgage to her. She made it possible for Ellsworth to perpetrate the wrong for which either she or respondent must now suffer, and we think equity is on the side of respondent.

Ellsworth was clothed with the apparent *indicia* of title, through the act of appellant. Stated another way, he had not, by the assignment to appellant, been divested of the role of agent or collector, or intermediary through whom she purchased mortgages, through whom payments were to be made, and by

whom mortgages were satisfied, so far as those vitally concerned were led to believe. Ellsworth collected the payments of interest and, in a number of cases, the principal, and remitted to appellant, although in the present case he failed to remit to her the payments made to him by Erickson on the principal of the mortgage. As further apparent authority of this agent, the mortgage was due and payable in 1912, but was by him extended more than once on request of respondent until final payment in 1919. Appellant knew of such extensions. She admits possession of the papers at all times. She stood by and permitted the extensions; therefore she will not now be heard to complain because of the failure of her agent to account. She is estopped to deny the satisfaction of the mortgage, in view of her placing it within her agent's power to extend the mortgage. *Bayley v. Paris*, 106 Wash. 248, 179 Pac. 795. Ellsworth could not have done this without authority, actual or implied. If there was not actual authority, because she did not positively direct such extensions, yet there was implied authority by reason of her failure to act when the mortgage fell due in 1912; and, having remained silent when she should have spoken, she will not now be heard to speak when she should remain silent.

Appellant argues that it was the duty of respondent, as the debtor assuming the mortgage, when making payment to Ellsworth, to see that Ellsworth was in possession of the security; or, in other words, that he was bound to see that the money he paid to Ellsworth actually went to the lawful holder of the mortgage. But, from what has been said, it is plain that respondent had every reason to believe that Ellsworth was the lawful holder of the mortgage. That he was mistaken as to this, was due to the acts of appellant,

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for which, under the circumstances, she, rather than respondent, must bear the consequences.

Under these circumstances, to uphold appellant in the position now taken by her would be contrary to equity and good conscience.

Judgment affirmed.

MITCHELL, PARKER, TOLMAN, and MAIN, JJ., concur.

[No. 15661. Department Two. July 28, 1920.]

A. ANDERSON, *Respondent*, v. J. E. GLENN *et al.*,
Appellants.¹

FERRIES—LICENSE TO OPERATE—EXCLUSIVE RIGHT—STATUTES. After issuance of a license for the operation of a ferry, the county commissioners have no power to license the operation of another ferry at the same place, or in such close proximity as to destroy the exclusive nature of the privilege, granted in such case by Rem. Code, § 5009, notwithstanding the county commissioners testified that it was not their intention to grant an exclusive franchise.

Appeal from a judgment of the superior court for Okanogan county, Davidson, J., entered January 22, 1918, in favor of the plaintiff, in an action for an injunction and for damages, tried to the court. Reversed.

J. Henry Smith, P. D. Smith, and W. C. Brown, for appellants.

Wm. O'Connor and W. C. Gresham, for respondent.

HOLCOMB, C. J.—In June, 1917, two ferries were being operated across the Okanogan river at the town of Monse, Washington, when plaintiff, the operator of one of the ferries, instituted this proceeding to restrain defendants, the operators of the other, from interfering with the one he was operating, and to re-

¹Reported in 191 Pac. 792.

cover damages for such alleged interference. This appeal is from a judgment of the trial court awarding damages and the injunctive relief prayed.

One R. M. Acord originally owned the ferry now being operated by respondent, and in 1916, the sheriff of Okanogan county levied upon and sold this ferry to satisfy a judgment held against Acord by the Spokane Merchants' Association. It seems that this concern purchased the ferry at the execution sale, and in March, 1917, sold it to respondent, Anderson, who undertook to operate it. He did not, however, procure a license to do this until May 8, 1917, at which time, under an order of the county commissioners of Okanogan county, the county auditor issued to him a license to operate and maintain the ferry at Monse. At this time appellants were already operating their ferry at the same place under a license therefor issued to appellant Glenn under date of February 7, 1917, he having complied with the requirements of the statute relating to the giving of notice of intention to apply for a license. There is testimony by two of the county commissioners and by the deputy county attorney to the effect that, at the time of the hearing upon Glenn's application for a license, attention was called to the fact that a ferry (the old Acord ferry) was already being operated by Anderson at the place in question; that they understood that the license issued to Glenn was not to interfere with the operation of a ferry by any one else at this point; and that the license was not given to Glenn to the exclusion of any other person. But the statute, Rem. Code, § 5009, provides that:

“Every person licensed to keep a ferry, according to the provisions of this article, shall have the exclusive privilege of transporting all persons and property over and across the stream where such ferry is established, . . .”

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The operation by Anderson of his ferry before this time was not under authority of a license issued to him. The license was not to the ferry boat and apparatus, but to the person operating. The execution sale transferred the personal property, but not the personal privilege. After the county commissioners had issued a license to Glenn in February, they could not properly issue one to Anderson in May. Glenn's right was exclusive, under the section of the statute quoted, the provision of law to that effect becoming an effective provision of his license the same as if incorporated therein.

Respondent says he is not attempting to enjoin appellants from operating their ferry at some other place, and claims that, by moving their cable and other appliances a short distance away from his on both banks of the river, appellants can operate their ferry without interfering with his boat. But, under the statute, as we have seen, there was an exclusive privilege to maintain a ferry at this place, and this privilege belonged to appellants. Even were the cable and other appurtenances of either party to the controversy moved so as to permit the operation of both ferry boats without either one interfering with the other, still the proximity of the two ferries would be such as to infringe upon the exclusive privilege assured by the statute to the person rightfully operating his ferry.

It follows that the judgment of the trial court must be, and it is, reversed and the cause dismissed.

BRIDGES, FULLERTON, MOUNT, and TOLMAN, JJ., concur.

[No. 15944. Department One. July 28, 1920.]

THE STATE OF WASHINGTON, *on the Relation of*
Donald Urquhart et al., Plaintiff, v. THE
SUPERIOR COURT FOR GRANT COUNTY,
Joseph Sessions, Judge,
*Respondent.*¹

EMINENT DOMAIN (14, 39)—STATE HIGHWAYS—NECESSITY OF APPROPRIATION—EVIDENCE—SUFFICIENCY. The evidence shows a reasonable necessity for a proposed state highway through farming lands of the relators, where it appears that the use of the present county roadway through a small town would entail the expenditure of large sums in the building of a viaduct and bridges, that the proposed route is a half mile shorter and eliminates excessive grades, curves and two railroad crossings at grade, and that the Federal government refused to aid in the enterprise should adverse plans proposed by the county be adopted.

SAME (14, 39)—LOCATION OF ROUTE—NECESSITY—APPROPRIATION ACT—STATUTES. The act of 1919, ch. 92, p. 223, appropriating funds for the construction of that part of the North Central Highway between Harrington and Wilson Creek, does not preclude use of the funds in the construction of the highway along a proposed route that does not run through the town of Wilson Creek; since the locating act, Laws of 1919, ch. 110, p. 268, omitted any mention of Wilson Creek and merely provided for the most feasible route between Ephrata and Krupp, and the evidence showed no feasible route to which the appropriation relates that will reach nearer the corporate limits of Wilson Creek than the route selected.

SAME (104)—PROCEEDINGS—CONDITIONS PRECEDENT—LOCATION OF ROAD—STATUTES. Rem. Code, § 5870, providing that no appropriation for the construction of a state road shall be expended thereon until the state highway board shall have declared the road feasible and approved maps, plans and specifications submitted by the highway commissioner after survey of the entire length of such highway and the making of outline and profile maps, must be held to be modified by the act of 1919, ch. 92, p. 223, making appropriation for the purpose of meeting the cost of constructing only specified parts of the state's highways.

¹Reported in 191 Pac. 416.

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Certiorari to review orders of the superior court for Grant county, Sessions, J., entered June 1, 1920, adjudging a public use and necessity in condemnation proceedings, after a hearing before the court. Affirmed.

E. J. Cannon, T. B. Southard, and C. G. Jeffers, for relators.

The Attorney General and Jno. A. Homer, Assistant, for respondent.

MITCHELL, J.—This action and that of the State v. Louis C. Williams *et al.*, and another, the State v. P. C. Lorentzen *et al.*, were instituted in the superior court of Grant county, for the purpose of condemning property through farm lands upon which to construct a portion of the North Central Highway. A hearing was had upon all the petitions, under stipulation of consolidation, resulting in an order in each case granting the petition therein and adjudicating public use and necessity as prayed for. Thereafter, upon application, this court issued its writ of certiorari, pursuant to which the proceedings leading up to and resulting in the entry of the orders complained of are here for review, and for which purpose the three cases have again been consolidated by agreement of counsel.

The legislature (Laws of 1919, ch. 110, p. 268), declared:

“Sec. 11½. That section 15 of chapter 164 of the Laws of 1915 be amended to read as follows:

“Section 15. A primary state highway is established as follows: A highway starting from a connection with the Sunset Highway at Ellensburg; thence by the most feasible route (heretofore the Sunset Highway) to the Columbia River near Vantage; crossing the same and continuing thence northeasterly by the most feasible route (heretofore the Sunset Highway)

to Quincy; thence by the most feasible route (heretofore the North Central Highway) through Ephrata, Krupp, Odessa, and Harrington to a junction with the Sunset Highway at Davenport, to be known as the North Central Highway."

The present county road running easterly from Ephrata reaches a point some 360 feet from the southwest corner of the corporate limits and about 1,400 feet from the business section of the town of Wilson Creek, thence it makes a northerly turn, crosses the Great Northern Railway tracks, and still further north enters Main street in the town of Wilson Creek, and follows that street easterly through the town, thence on to a point about one mile east of the town, thence runs to the south, again crosses the Great Northern Railway tracks, and runs about one-half mile further south to what is spoken of as the Lorentzen corner. Here the county road makes a right-angle turn to the left, and continues in an easterly direction about six miles to the town of Krupp. There is a stream, Crab creek, which flows from the east to Wilson Creek. Within several miles of the town on the east, the creek penetrates a large swampy section, and then runs on in low land through the city and to the south of Main street and the business and residence portion of the city and on the north side of the railway tracks. The swampy area is drained by a large ditch which runs on through the town. The ditch is ample to carry the water except during high water season, when the swamp is covered with water. There is a stream called Wilson creek which runs from the north through the easterly part of the town and empties into Crab creek. Immediately south of and within a few hundred feet of the town, a bench or hill rises precipitously from the low lands. It commences to rise from

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the west near the point at which the county road turns northerly to pass over the railway tracks into the city. After reaching the top of the hill, the surface is nearly level for some distance, and then slopes downward to the east. At a point where the present road turns northerly to cross the railroad into the city from the west, about 360 feet from the corporate limits, the proposed state highway leaves the county road and runs southeasterly and easterly, passes over the bench or hill, and thence down to the Lorentzen corner, where it connects with the present county road. From the west it runs across the lands of Mr. Urquhart, Mr. Williams, Mrs. Mitchell and Mr. Lorentzen. The territory through which it passes is used for farming, cattle and sheep raising and grazing purposes and, except portions of the Mitchell and Lorentzen places, it is sage brush land. The proposed route is shown to be a good one and is a half mile shorter than the way through the city. The state has already obtained the deed for a right of way across Mrs. Mitchell's place. Wilson Creek has a population of four hundred to five hundred. The proposed way was selected by the state highway commissioner, and the plans and specifications for construction of the highway were prepared by him and, together with the route, were approved by the state highway board, which directed the institution of these condemnation suits.

Relator contends: (1) That the evidence fails to sustain the court's order of necessity for the following reasons: (a) That the lands sought to be condemned are not necessary, nor is any part of them necessary, for the construction of the highway named; (b) that public enterprise does not require the highway on the location described; (c) that to construct

such highway at such location is an abuse of power; (d) that to take such property is oppressive. (2) That the state highway board lacks any power to condemn the property, because the legislature has established the road through the town of Wilson Creek and directed that its appropriations sought herein to be expended be expended only between Harrington and Wilson Creek.

Calling attention to the provisions of section 925, Rem. Code, that, in granting an order of necessity, the court shall be further satisfied "that the public interest requires the prosecution of such enterprise, . . . and that the land, real estate, premises or other property sought to be appropriated are required and necessary for the purpose of such enterprise," relators quote from the case of *State ex rel. Postal Tel-Cable Co. v. Superior Court*, 64 Wash. 189, 116 Pac. 855, as follows:

"We believe that the correct construction of this statute is that those invested with the power of eminent domain have the right in the first instance to select the land which, according to their own views, is most expedient for the enterprise, and that it invests the court with the power to determine whether specific land proposed to be taken is necessary in view of the general location, and to finally determine the question of necessity for the taking of such specific land when there is evidence of bad faith, or oppression, or of an abuse of the power in the selection."

The quotation should be continued, for immediately it was said:

"Plainly, the selection by the condemnor is evidence of the highest character that the land selected is necessary for the enterprise, and in the absence of clear and convincing evidence to the contrary, it conclusively established the necessity."

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However, the court further said in that connection:

"It is sufficient to make a strong *prima facie* case, but when convincing evidence is adduced by the owner that the land sought is not reasonably necessary, and that a slight change of location to other of his land will equally meet the necessity of the taker and be of much less damage to the owner, then it is incumbent upon the taker to rebut such evidence, since the refusal to make such change, if unexplained, would amount to oppression and be an abuse of the power."

While there is no claim or offer that other land of the relators may be taken, it is contended the principle is involved for the reason that the county road through the town or city of Wilson Creek will meet the necessity, thus doing away with the need of taking any private property, and that therefore the plan proposed by the state manifests bad faith, oppression and abuse of power.

Much of the proof of relators was in support of a route heretofore surveyed for a county road from Wilson Creek easterly to Krupp, considerably north of the present county road between those points; but, as we understand, relators practically abandon that plan (at least we think it indefensible) and rely upon the present county roadway as a substitute for the state's proposed route to justify their claim of bad faith and oppression at the hands of the state authorities.

It is shown there is a county road from Hartline south to Wilson Creek; that most of the settlers around Wilson Creek live to the north and west of the town. It is admitted the present crossing of the railway tracks and waterway near the southwest corner of the town is undesirable and dangerous, so that the county and city authorities and the Great Northern Railway Company are already interested in a proceeding before the public service commission looking to

the building at that point of an overhead crossing, largely of wooden material, which has been estimated to cost \$22,000, and that the roadway along Main street in the town would have to be slightly raised and strengthened to put it beyond the possibility of harm from exceedingly rare high water. Relators' evidence shows the improvement of the bridge over the stream named Wilson creek and a substantial culvert east of town for carrying the waters of Crab creek would be comparatively inexpensive. They estimate the total cost of all such improvements would be approximately \$30,000, which is \$16,000 less than the estimated cost of construction of the highway as proposed through relators' property. It is shown also by relators that a portion of the through travel east on the Sunset highway detours at Hartline by way of Wilson Creek, and it is plausibly argued that, to accommodate that travel, the settlers living north of Wilson Creek and the residents of the city itself, as well as the public generally, in reaching the highway as proposed by the state, or going from it to those localities, will still require the building and maintenance of the overhead crossing and other improvements along the county road, and that to build and maintain, in addition thereto, the highway as now proposed would be unwarranted as a matter of public expense and oppressive upon relators in the taking of their property.

On the contrary, the state, by way of explanation and meeting the charge of bad faith made upon it, shows by its proof that its route is the only feasible and practicable route; that it has a maximum grade of only five per cent and is free from curves of any consequence; that it is about one-half mile shorter to the Lorentzen corner than the road through the city; and that the soil is well adapted for road building.

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It is shown to be the policy of the state highway authorities in constructing such roads to avoid railway crossings at grade and that its proposed plan avoids two such crossings—one on each side of the town. It was also proven that, according to the material used and construction adopted by the state in building state highways, a viaduct over the railway and stream at the west of the town would cost \$120,000, a bridge over the stream called Wilson creek, \$8,000, about \$8,000 for a crossing over Crab creek ditch, and still there would be left a railroad grade crossing to the east if the county road route were adopted. The evidence shows that a viaduct along the county road to cross over the swampy land and railroad to the east of the city would cost approximately \$150,000.

An appropriation of over one million dollars by the Federal government is available for assisting this state in the building of its permanent highways, provided the plans and specifications, etc., meet with the approval of its engineers. In this particular case the state highway commissioner, upon learning of the plan of overhead crossing proposed by the county and railway company at a cost of \$22,000, submitted the same to the engineers of the national government and was advised no Federal aid would be supplied if it or anything other than that kind of construction which, according to the testimony in this case, is being generally used by the state in such work were adopted. While it is true the Federal appropriation is still available if none of it is used on this project near Wilson Creek, yet it is also true that the state has by necessity arranged its plans so as to use a part of the Federal appropriation at this point where three and one-third miles are under contract to be built at a cost of \$46,000. The incident of the rejection by the United States en-

gineers of the plans proposed and considered by the county and railway company for going through the town is of importance as a testimonial in favor of the judgment of the state authorities, when we come to consider the charge of bad faith made against them by the relators. In this case it was testified to by the state's witnesses that, in locating primary or permanent state highways, consideration was always taken of local interests, provided they did not result in making the highway dangerous or cause an unwarranted demand upon the appropriation. In 1913, the legislature, in § 2 of an act (Laws of 1913, ch. 30, p. 75; Rem. Code, § 8733-2), relating to road and highway crossings, provided:

“All highways and extensions of highways hereafter laid out and constructed shall cross existing railroads by passing either over or under the same, when practicable, etc.”

This is the policy the testimony shows the state highway authorities are observing generally and are seeking to apply in the present case. In the recent case of *State v. Superior Court, Adams County*, 111 Wash. 542, 191 Pac. 413, in discussing the matter of condemning rights of way for a primary state highway, this court said:

“The advent of the automobile and the auto-truck, and the consequent extensive and ever-growing use to which roads are put makes it necessary that main thoroughfares be built upon the best route obtainable.”

It is the contention of the state that the present road through the town of Wilson Creek presents many difficult engineering problems the solution of which would run into figures that make the construction of the North Central Highway over that route absolutely pro-

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hibited; and certain it is that the present appropriation is wholly inadequate for any such plan.

The duty and power of locating these primary state highways is reposed by the statute upon the state highway authorities, subject, of course, to the right of appeal to the courts in case of bad faith or an abuse of that power. In this case the record satisfies us there has been no abuse of that power, and that there is a reasonable necessity for acquiring the right of way through relators' property.

Secondly, it is claimed that the state lacks power to condemn relators' property because the legislature has established the route through the town of Wilson Creek. This contention is made because of the provisions of ch. 92, p. 223, Laws of 1919, which is the public highway appropriations act, and which reads:

"For engineering, construction and improvement, and paving of the primary and secondary highways of the state hereinafter enumerated, there is hereby appropriated out of the Public Highway Fund and the Motor Vehicle Fund, the respective sums as follows:
 . . . Sunset Highway . . . between Harrington and Wilson Creek (North Central Highway), Public Highway Fund \$50,000, Motor Vehicle Fund \$50,000."

In effect, it is argued that it definitely locates this highway through Wilson Creek, and further, that the proposed route is not "between" Wilson Creek and Harrington, and consequently, as this fund could not be used for constructing the highway as proposed by the state, there is no necessity for acquiring relators' lands. What may be termed the locating act, ch. 110, p. 268, Laws of 1919, hereinbefore quoted from, in establishing the North Central Highway, omits any mention of Wilson Creek, which is situated between the towns of Ephrata and Krupp, and which two towns are named in the act; it simply provides for the most

feasible route. An examination of the statutes of this state discloses there have been established or created a large number of state highways in the last several years, and that it has been the policy of the legislature to make appropriations from time to time to meet the expenses of engineering, construction, improvement, etc., of specified portions of the different highways. The terms of such act, in this respect, are intended to designate or identify the particular link or stretch of the whole highway to which a given appropriation shall apply. In this case we are satisfied there has been a proper application of that item in the appropriation act of 1919, in undertaking to use it for a route through relators' lands, since the evidence shows there is no feasible route for the stretch of highway to which the appropriation act relates that will reach nearer the corporate limits of the town of Wilson Creek than the route adopted.

Further, without its being specifically enumerated in the assignment of errors, it is contended the appropriation in this case cannot be used, and hence there can be no taking of relators' property, because the evidence shows that the provisions of § 5870, Rem. Code, have not been complied with. That section reads:

“Whenever any money is appropriated for the construction of a state road, the state highway commissioner shall, unless such road has been theretofore surveyed, cause survey to be made of the entire length of such highway, and cause the same to be mapped both in outline and profile, and shall also cause plans and specifications for the construction of such highway to be prepared. Such maps, plans and specifications shall be thereupon submitted to the state highway board, and no portion of any appropriation shall be expended upon such road until the state highway board shall have declared such road feasible and shall

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have approved said outline and profile maps and said plans and specifications.”

That law was passed in 1907 (Laws of 1907, p. 295, § 4), before it became the practice of the legislature to define primary highways from one end to the other, and must be held to be modified by the act of 1919 in making an appropriation for the declared purpose of meeting the cost of engineering, construction, etc., of only specified portions of the state's highways.

The orders complained of are affirmed.

HOLCOMB, C. J., MAIN, PARKER, and MACKINTOSH, JJ.,
concur.

[No. 15766. Department One. August 3, 1920.]

E. J. BAILEY *et al.*, *Respondents*, v.

ELLEN M. HENNESSEY, *Appellant*.¹

EASEMENTS (12)—IMPLIED EASEMENTS—CREATION. The essentials of an easement by implication are (1) a separation of title; (2) a permanent use before separation impressed upon one part of the estate in favor of the other; which (3) shall be necessary to the beneficial enjoyment of such part.

SAME. The necessity for an easement by implication is such reasonable necessity as renders the easement essential to the convenient or comfortable enjoyment of the property as it existed before severance of title.

EASEMENTS (12, 13)—IMPLIED EASEMENTS—EVIDENCE—SUFFICIENCY. An implied easement in the right to the use of an alley-way by the owner of a building engaged in the feed business is sufficiently shown by evidence that the common grantor of the adjoining lots erected buildings upon the lots with a view of using the alley-way provided in the rear, that such use was intended to be of permanent character and was notorious and plainly visible, that the alley-way was so used for fourteen years and was necessary to the beneficial enjoyment of the property.

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered October 11, 1919,

¹Reported in 191 Pac. 863.

upon findings in favor of the plaintiff, in an action to enjoin the obstruction of an easement, tried to the court. Affirmed.

Leo McCarty and *Homer L. Past*, for appellant.

E. J. Doyle, for respondents.

MACKINTOSH, J.—The facts in this case as they are disclosed by the record can be no better stated than they are in the findings of the trial judge, and we will therefore quote findings numbers four to fifteen, inclusive:

“IV. That on February 13, 1902, Nellie S. Ramsey became the owner of lot one (1), block nine (9), Clarkston, Asotin county, state of Washington.

“V. That prior to March 22, 1904, she erected on said lot, facing Sycamore street on the south line of said lot, two store buildings and a hotel each of which buildings extended back to within ten feet of the north boundary line of said lot, leaving a ten-foot alley or driveway along the entire north boundary line of said lot;

“VI. That on and prior to March 22, 1904, this ten-foot strip was used by the lessees and occupants of said building and the owner as a driveway to reach the rear of said buildings and in the unloading of merchandise and furniture at the back entrance of said buildings.

“VII. That said buildings were erected with regular store and front entrances on Sycamore street, and that said store buildings were erected with rear doors and platforms with reference to said ten-foot alley way, and that the floors of said buildings were constructed for the use of the entrances on Sycamore street, as store entrances, and the entrances on the alley for receiving and unloading merchandise and furniture from said store buildings.

“VIII. That said driveway was apparent and obvious and has been continually used from the time that the first building was erected, up and to October 3,

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1918, when the defendant constructed a fence and obstruction across said alley way, immediately following which this action was instituted to restrain the defendant from interfering with the use of said alley way as such alley.

"IX. That said driveway is necessary for the convenient and comfortable enjoyment of said store buildings as they existed on and prior to March 22, 1904, and has continued as necessary for the convenient and comfortable enjoyment of the same ever since said time.

"X. That on March 22, 1904, the said Nellie S. Ramsey deeded the east forty feet of lot one (1), block nine (9), Clarkston, to William McCarroll, the predecessor in title to the plaintiffs in this action.

"XI. That on October, 1908, said Nellie S. Ramsey deeded the west 87½ feet of said lot one (1), being the remainder of said lot, to J. E. Hennessey, the predecessor in title to the defendant in this action.

"XII. That since some time prior to March 22, 1904, and up to October 3, 1918, said driveway was continuously used by the plaintiffs and their predecessors in interest as such driveway, and was at all times necessary to the convenient and comfortable use and enjoyment of the said buildings.

"XIII. That on October 3, 1916, the defendant obstructed said driveway by building across the same, and has since continued to obstruct the same.

"XIV. That for fourteen years prior to the obstruction of said driveway the plaintiffs and their predecessors in interest have openly used and continuously used the said driveway in loading and unloading merchandise and furniture at the rear entrance of said building and hauling such goods by such conveyances out of said buildings through said alley.

"XV. That since the erection of said buildings all of said buildings have been used as store and business buildings."

The court having entered a decree in conformity with the prayer of the complaint that the respondents have the use of the alley way, and that the appellant be

forever enjoined and restrained from placing any obstructions therein, or preventing the free use thereof, the defendant has appealed.

Much of the discussion in the briefs and oral argument of the appellant can be disposed of if we first clearly establish in our minds exactly what is being contended for in this action. This is not an action claiming a private way of necessity, nor is it an action seeking to establish a public way by open, notorious and continued public use for over seven years, nor is it an action to establish a private easement by prescription; but it is a claim by the respondents of a right to use this alley way as an easement "necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made," and that the common owner, in 1904, erected buildings on the entire lot then owned by her with reference to the use of this disputed strip as an alley, the buildings having been constructed so that they would require a complete lowering of all the floors if the alley could not be used, and thereafter sold the buildings with the use of the alley as an inducement entering into the sale, and as an advantage connected with the property sold; that thereby an easement had been created of which the plaintiffs can assert the benefit. In other words, we are here dealing with only an easement by implication, to which rules of law different from those of easement by prescription, or public easements or private rights of way of necessity, are applicable.

Easements by implication arise where property has been held in a unified title, and during such time an open and notorious servitude has apparently been impressed upon one part of the estate in favor of another part, and such servitude, at the time that the unity of title has been dissolved by a division of the property

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or a severance of the title, has been in use and is reasonably necessary for the fair enjoyment of the portion benefited by such use. The rule, then, is, that upon such severance, there arises, by implication of law, a grant of the right to continue such use.

In determining whether the facts of a particular case bring it within the application of this rule, it is necessary to determine the extent of the use, the character, and the surroundings of the property, the relationship of the parts separated to each other, and the reason for giving such construction to the conveyances as will make them effective according to what must have been the real intent of the parties, the foundation of the rule being that there shall be held to have been included in the conveyances all the rights and privileges which were incident and necessary to the reasonable enjoyment of the thing granted, practically in the same condition in which the entire property was received from the grantor.

Some courts have said that these easements are granted on the principle of estoppel; that is, that the grantor cannot derogate from his own grant. Other courts have based the right upon the presumption that the parties have made and received the conveyance having in view the condition of the property as it actually was at the time of the sale, and that therefore neither, without the consent of the other, can change the open and apparent conditions to the detriment of the other. *Cogswell v. Cogswell*, 81 Wash. 315, 142 Pac. 655; 3 Farnham, Waters and Water Rights, § 831.

“ ‘If the owner of land has artificially created upon the property a condition which is favorable to one portion of his property, and then sells that portion, the grantee will take it with the right to have that favorable condition continued. . . . Upon the severance of the heritage a grant will be implied of all those con-

tinuous and apparent easements which had in fact been used by the owner during the unity. . . .” *Nicholas v. Chamberlain*, 2 Crokes, K. B. 121.

Three things are regarded as essential to create an easement by implication; first, “a separation of the title; second, that, before the separation takes place, the use which gives rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and, third, that the easement shall be necessary to the beneficial enjoyment of the land granted or retained.” 9 R. C. L. 757.

Examining the testimony in this case to determine whether these three requirements have been met, we find, first, that there was a unity of title. In 1902 Mrs. Ramsey acquired title to what are now the dominant and servient tenements. In 1904 she conveyed a portion which is now the property of the respondents, and in 1908 conveyed the balance, which is the property of the appellant; second, that Mrs. Ramsey, during her ownership, erected buildings upon both portions of the property; their erection being with a view to the use of the alley way, and the testimony shows that such use could not have been intended as a temporary convenience, but that the servitude impressed was intended to be of a permanent character, and was notorious and plainly visible. From this the court has the right to determine that Mrs. Ramsey intended the servitude to be preserved, and it was evidently necessary to the convenient enjoyment of the property. The evidence also discloses that this had been continuous from 1904 until 1918. Third, the evidence discloses that the easement is necessary to the beneficial enjoyment of the lands granted. Though the courts are not unanimous, the majority rule is that the necessity need

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not be a strict necessity but need only be a reasonable necessity, and that degree of necessity is sufficient which merely renders the easement essential to the convenient or comfortable enjoyment of the property as it existed when the severance took place.

We have not heretofore been called upon to determine, in questions of easements by implication, what degree of necessity is required, but the question has arisen in cases involving other sorts of easements, and we have adopted the interpretation just stated, and there is no reason why a stricter one should be applied in cases of this nature. *Schumacher v. Brand*, 72 Wash. 543, 130 Pac. 1145; *State ex rel. Mountain Timber Co. v. Superior Court*, 77 Wash. 585, 137 Pac. 994; *State ex rel. Stephens v. Superior Court*, 111 Wash. 205, 190 Pac. 234, and cases there cited.

We have held that a right of way by implication arises only from necessity and never from convenience, but have not established heretofore the measure of such necessity. *Jemo v. Tourist Hotel Co.*, 55 Wash. 595, 104 Pac. 820, 19 Ann. Cas. 1199, 30 L. R. A. (N. S.) 926; *Roe v. Walsh*, 76 Wash. 148, 135 Pac. 1031, 136 Pac. 1146.

The testimony shows that the business of respondents cannot properly be carried on by using the sidewalk in front for the purpose of taking in and out hay, grain and feed (the respondents being engaged in that line of business); that the buildings were not so constructed as to permit of proper ingress and egress through the front entrance for trucking; that, if respondents were compelled to use the front entrance, they would be handicapped in their dealings with the public; that the buildings can be conveniently used only by a rear entrance, and were constructed for the purpose of using the alley way in connection with such

entrance and that closing the alley way would result in a detriment to the public and a depreciation of the value of the building; and that it is essential to the respondents' business to have certain facilities for carrying it on, and that a rear entrance is one of those facilities.

Under all the testimony, it is clear that a reasonable necessity exists for the perpetuation of a condition existing at the time of the severance of the estate and which has been in continuous, open and apparent use, and acquiesced in by all parties interested for a long term of years.

The facts of the case bring it within the requirements of the rule we have stated, and the trial court was correct in determining that an easement by implication existed and was impressed upon the servient tenement owned by the appellant.

The judgment and decree will be affirmed.

HOLCOMB, C. J., PARKER, MAIN, and MITCHELL, JJ.,
concur.

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Syllabus.

[No. 15828. Department One. August 3, 1920.]

THE STATE OF WASHINGTON, *Respondent*, v.
HERMAN HESSEL, *Appellant*.¹

INTOXICATING LIQUORS (30)—OFFENSES—ILLEGAL POSSESSION—INTENT TO SELL—OVERT ACT. Laws of 1917, § 17h, defining a "bootlegger" as any person who carries about intoxicating liquor with the purpose of unlawful sale of the same, and declaring such crime to be a felony, is not unconstitutional in that it attempts to punish an intent to do an act not coupled with an overt criminal act, since it is not the intent which is punished, but the act of peddling liquor with intent to sell it.

CRIMINAL LAW (461)—CRUEL OR UNUSUAL PUNISHMENT—SEVERITY OF SENTENCE FOR BOOTLEGGING. The fact that Laws of 1917, § 17h, declares the offense of bootlegging to be a felony, while other sections of the act merely make it a misdemeanor to sell liquor unlawfully, is no reason for declaring such section unconstitutional on the ground that it provides for cruel and unusual punishment, the legislature apparently deeming such offense more subversive of the morals of the community than that of possession or isolated sales.

SAME (110-112)—EVIDENCE OF OTHER OFFENSES—INTENT—ADMISSIBILITY. Upon a prosecution for bootlegging, under Laws of 1917, § 17h, it is proper to admit evidence of separate and distinct unlawful sales in order to prove guilty intent.

INTOXICATING LIQUORS (51)—BOOTLEGGING—INSTRUCTIONS ELIMINATING OTHER OFFENSES. Upon a prosecution for bootlegging, under Laws of 1917, § 17h, it is error to refuse requested instructions that defendant was not being prosecuted for other offenses and could only be convicted of carrying liquor about for the purpose of unlawful sale, where the jury might be misled by evidence of sales which was admitted to show intent, or evidence which might induce the belief that defendant had solicited orders or kept a place for the unlawful sale of liquor.

SAME (51)—BOOTLEGGING—INSTRUCTIONS AS TO OTHER OFFENSES. In a prosecution for bootlegging, under Laws of 1917, § 17h, it is error for the court to instruct that it is not necessary for the state to prove matters and things contained in the balance of the section, which the court had just quoted, as it tended to confuse the issue by calling attention to matters upon which there was no evidence, and to a crime with which defendant was not charged.

¹Reported in 191 Pac. 637.

CRIMINAL LAW (329)—TRIAL.—INSTRUCTIONS AFTER SUBMISSION OF CASE. The giving of instructions by the court on its own motion, after the jury had retired, and without request from jury or counsel, is not to be commended, though the error may not have been prejudicial.

INTOXICATING LIQUORS (50)—BOOTLEGGING—EVIDENCE—SUFFICIENCY. The evidence is sufficient to sustain a conviction of bootlegging, under Laws of 1917, § 17h, where it shows a sale of bottled whiskey to the prosecuting witness in a hotel room, and though the evidence was stronger in tending to show unlawful possession or an unlawful sale, yet there was sufficient from which the jury might have found that defendant was guilty of the crime charged, and not of unlawful possession or sale.

Appeal from a judgment of the superior court for Franklin county, Truax, J., entered December 11, 1919, upon a trial and conviction of the unlawful possession of intoxicating liquor. Reversed.

Chas. W. Johnson, for appellant.

E. M. Gibbons and *C. M. O'Brien*, for respondent.

MACKINTOSH, J.—The defendant was tried and convicted under chapter 19, Laws of 1917, p. 60 § 17 (h), which provides: “. . . any person who carries about with him intoxicating liquor with the purpose of the unlawful sale of the same be, and is hereby defined to be, a bootlegger. Any person convicted of being . . . a bootlegger as herein defined shall be guilty of a felony.”

The appellant urges, first, that this section is unconstitutional for the reason that it attempts to provide for the punishment of an intent to do an act, not coupled with an overt criminal act, and bases his argument upon the case of *Proctor v. State*, 15 Okl. Cr. 338, 176 Pac. 771. The fallacy of appellant's argument and the decision upon which he relies, lies in this—that they overlook the fact that the section in question is aimed at the carrying around of liquor for

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the purpose of selling it, and that it is not the intent which is being punished but the act of peddling liquor with the intent to sell it. A person cannot be punished for merely possessing an unlawful intent, but he may be punished for acts which are forbidden but are not *malum in se* if they are coupled with an unlawful intent. The statute is one against the peddling of liquor as a business, and that avocation, connected with the intent of disposing of the liquor, furnishes the overt act which must accompany the intent in order to constitute the crime.

It is also urged against the constitutionality of this section that it violates Const., art. 1, § 3, and the eighth amendment to the Federal constitution, in that it provides for cruel and unusual punishment, the section making it a felony to carry liquor about with the intent of selling it, whereas other sections of the act merely make it a misdemeanor to sell liquor unlawfully; in other words, that the lesser crime in fact is punished by the severer penalty. It might be that a very plausible argument can be made based on this hypothesis, but the fault lies in that the hypothesis is false. The offenses of selling liquor unlawfully, or possessing it unlawfully, were deemed by the legislature to merit punishment as misdemeanors; but the engaging in the business of bootlegging, which we have defined as the peddling of liquor with intent to unlawfully dispose of it, was deemed by the legislature more subversive of the morals of the community than an isolated sale or possession, and we cannot say that a person who is engaged in that business does not deserve severer punishment than one who is convicted of merely making a sale, or having liquor in his possession.

“The States as a part of their police power have a large measure of discretion in creating and defining criminal offences.” 12 C. J. 1185. The legislature had a right to take into consideration the general experience in attempts to suppress the illegal sale of liquor and to draw upon that experience in determining that persons who carry liquor about with them with the intent to sell it should be more severely punished than persons who have liquor in their possession or might make a sale thereof. The element of intent is a part of the crime of bootlegging and the legislature in fixing the punishment considered that. “The purpose of our law is to graduate punishment according to the guilt involved.” 1 Wharton, Criminal Law (11th ed.), p. 13. We see no merit in this objection to the constitutionality of the section. The recent case of *State v. Burgess*, 111 Wash. 537, 191 Pac. 635, had under consideration the companion offense of being a jointist, and this court there arrived at the conclusion that the statute in that regard was constitutional, and we now hold that the statute defining and punishing bootlegging is constitutional.

The appellant urges that evidence was improperly admitted of separate and distinct unlawful sales of liquor. One of the elements of the crime necessary for the state to prove is the purpose for which the liquor was carried about, and in order to show that purpose and intent evidence of various sales was admissible. The case of *State v. Smith*, 103 Wash. 267, 174 Pac. 9, cited by appellant, was a case in which the act charged against the defendant characterized the offense and was proven by proving the act. Here the guilty intent must be proven by acts other than the act of carrying liquor about and proof of sales was com-

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petent to prove that intent. *State v. Raymond*, 24 Conn. 204.

A considerable confusion appears in the record by reason of exceptions taken to the refusal to give requested instructions, and exceptions taken to instructions given. The appellant requested that the court instruct the jury that he was not being prosecuted for the sale of intoxicating liquor, or with the taking or soliciting of orders for the purpose of selling intoxicating liquors, or with maintaining a place for the sale of intoxicating liquors, and that he could only be convicted of carrying liquor about with him for the purpose of unlawful sale, and that this did not mean "transporting liquor from one given place to another with no intention of sale while being so transported."

In view of the fact that the jury might easily be misled by the evidence of sales which was introduced solely for the purpose of showing intent, and by evidence which might have allowed the jury to believe that the appellant had solicited orders, or that he might be maintaining a place for the unlawful sale of liquor, these instructions should have been given. Although, as a general rule, the court is not required to inform the jury with what crimes the defendant is not charged, we have no question here of requested instructions of a lower offense than that charged, but it was desired to have the court call the jury's attention to matters which involved other offenses, with which the appellant was not charged.

It is also urged that the court erred in giving instruction No. 7, which reads:

"Other sections of the statute under which this prosecution is brought are as follows: It shall be unlawful for any person other than a regularly ordained clergyman, priest or rabbi actually engaged in ministering

to a religious congregation, to have in his possession any intoxicating liquor other than alcohol.

"In any prosecution for the violation of any provision of this act it shall be competent to prove that any person, other than a regularly ordained clergyman, priest or rabbi actually engaged in ministering to a religious congregation, had in his possession any intoxicating liquor other than alcohol, and such possession and proof thereof shall be *prima facie* evidence that said liquor was so held and kept for the purpose of unlawful sale or disposition.

"And I instruct you further that it is not necessary for the state in this prosecution to allege in the information that the defendant is not a regularly ordained clergyman, priest or rabbi actually engaged in ministering to a religious congregation, and it is not necessary for the state to prove in this case that the defendant is not or was not a regularly ordained clergyman, priest or rabbi actually engaged in ministering to a religious congregation."

The court then goes into the other portion of § 17h in which is contained the prohibition against bootlegging; then he proceeds to tell the jury that it is not necessary for the state to prove matters and things contained in the balance of the section which the court had just quoted. This was clearly erroneous and prejudicial, as it tended to confuse the issue before the jury, by calling their attention to matters upon which there was no evidence, and to a crime with which the defendant was not charged.

It is next urged as error that, after the jury had retired at the conclusion of the argument, and without any request from the jury or from counsel, and after the jury had been deliberating, the court, on its own motion, called the jury back for additional instructions. Rem. Code, § 352, provides for further instruction to the jury, and although the error complained of

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may not have been prejudicial, it is a practice which ought not to be recommended.

It is finally contended that there is no evidence upon which the verdict of bootlegging could be returned. The evidence shows that a sale was made to the prosecuting witness of bottled whiskey in a hotel room at Connell. While the evidence in the case is stronger in proof of the appellant's guilt of unlawfully having liquor in his possession or of having made an unlawful sale of it, there was some evidence tending to prove that he was guilty of bootlegging, that is, of peddling liquor with intent to sell it. There was enough evidence from which the jury might have found that the state had proved that the appellant was engaged in the business of carrying liquor about with the intent to sell it, and that the appellant did more than to have liquor in his possession and sell it.

For the reasons indicated in this opinion, the judgment will be reversed and a retrial ordered.

HOLCOMB, C. J., PARKER, MAIN, and MITCHELL, JJ., concur.

[No. 15787. Department One. August 3, 1920.]

ALEXANDER PEARSON, *Appellant*, v. M. GOTTSTEIN
INVESTMENT COMPANY *et al.*, *Respondents*.¹

APPEAL (145)—PRESERVATION OF GROUNDS—EXCEPTIONS TO FINDINGS. Findings made in an equity case, while not necessary, are as conclusive on appeal, when made, as in law actions, unless duly excepted to.

SAME (150)—EXCEPTIONS TO FINDINGS—SUFFICIENCY OF GENERAL EXCEPTION. A general exception to the refusal of the court to make findings requested by appellant, evidenced in the record by the words "plaintiff duly excepted thereto", is insufficient to secure a review of the evidence on appeal.

PLEADING (6)—CONCLUSIONS FROM FACTS ALLEGED. In an action to recover a balance due upon a construction contract, an allegation in the affirmative answer that plaintiff "forfeited any right to compensation" is but a conclusion that, in the light of preceding allegations, defendants' damages caused by plaintiff's neglect of the work exceeded the amount of plaintiff's claim, and was not the pleading of a technical forfeiture.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered December 2, 1919, upon findings in favor of the defendants, in an action on contract, tried to the court. Affirmed.

Arthur C. Dresbach, for appellant.

Preston, Thorgrimson & Turner, for respondents.

PARKER, J.—The plaintiff, Pearson, seeks recovery from the defendants of the sum of \$2,407.52 as a balance claimed to be due him upon a construction contract for the remodeling of the interior of a large business block owned by the defendants, situated in the business district of Seattle; and also the foreclosure of a lien upon the property, claimed by the plaintiff by virtue of the performance of the contract.

¹Reported in 191 Pac. 796.

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Trial in the superior court for King county resulted in findings and judgment in favor of the defendants denying any recovery, from which the plaintiff has appealed to this court.

The contract provided that appellant should furnish all material and cause to be performed all labor necessary for the completion of the improvement according to plans and specifications prepared by architects; that respondents should pay to appellant the cost of all the material and labor "at the lowest market rates," and eight per cent additional as his compensation for carrying the improvement to completion; and "that the contractor (appellant) shall push the work to completion as rapidly as possible." The improvements being completed by appellant at a cost to him of \$52,425.53, and appellant claiming a balance due him from respondents upon the contract and his percentage compensation, of \$2,407.52, they have defended and resisted appellant's claim upon the ground, in substance, that, by reason of appellant's inattention to the work, its completion was delayed beyond a reasonable time for completion, to their damage, especially in the loss of rents they would have received in excess of the amount of his claim of balance due on the contract, had the improvement been completed within such reasonable time, making the rooms of the building available for renting. The trial court made findings of fact fully covering the substantial issues of the controversy, which we regard as clearly supporting the conclusion that the inattention to the work on the part of appellant did result in an unreasonable delay in its completion, resulting in respondents' damage in a sum greater than the balance claimed by him, which findings therefore clearly support the judgment denying recovery. No exception whatever was taken to the

finding in appellant's behalf. A general exception was, however, taken to the refusal of the court to make findings, ten in all, requested by counsel for appellant, which general exception is evidenced in the record by these words: "plaintiff duly excepted thereto" indorsed at the foot of the requested findings.

According to our repeated holdings, findings of fact made by a trial court are conclusive upon appeal, unless duly excepted to. While this is a suit in equity wherein findings are not necessary as in law actions, when they are made in such a suit, they become as conclusive upon appeal as when made in a law action. *Yakima Grocery Co. v. Benoit*, 56 Wash. 208, 105 Pac. 476; *Hagen v. Balcom Mills*, 74 Wash. 462, 133 Pac. 1000, 134 Pac. 1051; *Harbican v. Chamberlin*, 82 Wash. 556, 144 Pac. 717; *Yarbrough v. Pellissier*, 83 Wash. 49, 145 Pac. 81; *Beeler v. Barr*, 90 Wash. 258, 155 Pac. 1040; *Ready v. McGillivray*, 109 Wash. 387, 186 Pac. 902.

It is equally plain, under our decisions, that such a general exception as we have here, is not sufficient, when directed to a number of findings covering the whole case upon the merits, to call for a review of the evidence to determine questions of fact upon appeal; and this is true whether exception be taken to the findings made by the court or to the refusal of the court to make a number of requested findings, as was done in this case. In *Pederson v. Ullrich*, 50 Wash. 211, 96 Pac. 1044, it was said:

"No exceptions either to findings made or to those requested and refused appear in the record. In their reply brief the appellants concede that the only mention of any exceptions being taken appears in the certificate of the trial judge to the statement of facts, as follows: 'That the findings of fact and conclusions of

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law hereto attached were the ones proposed by defendants and rejected and refused by the court and exception allowed thereto.' This, if conceded to be an attempt at exceptions to findings requested, will not secure a review of the evidence, as a general exception to all findings made, or all findings requested and refused, is insufficient for any such purpose."

See, also, *Crowe & Co. v. Brandt*, 50 Wash. 499, 97 Pac. 503; *Fender v. McDonald*, 54 Wash. 130, 102 Pac. 1026; *Yakima Grocery Co. v. Benoit*, 56 Wash. 208, 105 Pac. 476; *Snohomish River Boom Co. v. Great Northern R. Co.*, 57 Wash. 693, 107 Pac. 848; *Meacham v. Seattle*, 69 Wash. 238, 124 Pac. 1125; *Sallaske v. Fletcher*, 73 Wash. 593, 132 Pac. 468, Ann. Cas. 1914 D 760, 47 L. R. A. (N. S.) 320.

We conclude, therefore, that we must view the facts as found by the trial court. We deem it not out of place, however, to here observe that a perusal of the short abstract convinces us that our disposition of the case upon its merits would be in respondents' favor even if it were necessary for us to discuss the merits.

While counsel for appellant seems to make his principal contention upon the merits of the case in the light of the evidence, he also makes contention that the defense of damages by way of set-off as against appellant's claim was not well pleaded. It is true, as counsel points out, that respondents plead in their affirmative answer in the concluding paragraph thereof, that appellant has "forfeited any right to compensation." This, however, is only pleading a conclusion which, in the light of the preceding allegation, can only mean that the damages which respondents claim to have been caused by appellant's neglect of the work exceeds the amount of appellant's claim. It is not the pleading of a technical forfeiture, as counsel for appellant seems

to argue. We think this contention is not well grounded.

The judgment is affirmed.

HOLCOMB, C. J., MAIN, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15797. Department One. August 3, 1920.]

MANLEY SMITH, *by his Guardian etc., Appellant*, v.
SEATTLE SCHOOL DISTRICT No. 1 *et al., Respondents*,
IRENE CROSS, *Defendant*.¹

COUNTIES (59)—REPRESENTATION—TORTS OF OFFICERS OR AGENTS—SCHOOL SUPERINTENDENT AS AGENT—LIABILITY. A county is not liable under the doctrine of *respondeat superior* for the torts or negligence of the county superintendent, as the relation of principal and agent does not exist, since the officer is elected by the people, his duties prescribed by statute, and not subject to the control of the county in the execution of its governmental powers.

SCHOOLS AND SCHOOL DISTRICTS (29-1)—NEGLIGENCE (6)—DANGEROUS ELEVATOR IN SCHOOL BUILDING—CARE AS TO EMPLOYEE OF LICENSEE. A school district is not liable for injury suffered by a twelve-year-old boy through the dangerous condition of an elevator used by him while employed by the manager of a lunch room in a high school building during the holding of a teachers' institute in charge of the county superintendent, since the superintendent was a mere licensee under Rem. Code, § 4481, granting permission to use the school room for certain public gatherings; and the boy being an employee of the licensee, was entitled to no greater rights in respect to the condition of the elevator.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 4, 1919, dismissing an action for personal injuries, in sustaining demurrers to the complaint. Affirmed.

¹Reported in 191 Pac. 858.

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Opinion Per HOLCOMB, C. J.

Meyers & Couden and *Edward H. Wright*, for appellant.

Henry W. Pennock and *James R. Gates*, for respondent Seattle School District No. 1.

Fred C. Brown and *Wm. Parmerlee*, for respondent King County.

HOLCOMB, C. J.—Plaintiff, a minor, brought this action by his guardian *ad litem* against defendants to recover for personal injuries sustained by him because of the alleged negligence of defendants in the operation of a freight elevator while plaintiff was employed in a lunch room maintained at the Broadway High School Building in Seattle. This appeal is from orders of the trial court sustaining separate demurrers by defendants Seattle School District No. 1 and King county to plaintiff's amended complaint, and dismissing his action upon his refusal to plead further.

The alleged facts may be summarized as follows: Respondent Seattle School District No. 1 had caused a lunch room to be installed in the Broadway high school building, and during regular sessions of the school it was operated for the convenience of teachers and pupils of that school; but on August 28, 1917, at the time of appellant's injury, the lunch room was in operation for the benefit of teachers attending an institute being conducted in the building by the county school superintendent with the permission of respondent Seattle School District No. 1. This lunch room was on the fifth floor of the building, and the electric freight elevator upon which appellant was injured ran between the fifth floor and the basement. On the 28th day of August, 1917, appellant, a boy twelve years of age, was employed by the manager of the lunch room to assist

in kitchen work in connection with the operation of the lunch room, and in the performance of such duties he was directed by the manager to do an errand in the basement. He used the elevator to reach the basement, and in attempting to return the same way, he stepped into the open space between the edge of the elevator and the wall of the shaft and sustained the injuries for which recovery is sought.

The complaint charged that the elevator was negligently maintained, because (1st) there was a space of from four to six inches between the floor of the elevator and the front wall of the elevator shaft with no guard to prevent a person riding on the elevator from stepping therefrom into the open space between the edge of the elevator floor and the wall of the shaft; and because (2nd) no notice was posted in or near the elevator calling attention to its construction or to the fact that its operation by a person of tender years was dangerous and constituted a menace to life and limb. Respondents were charged by the complaint with notice of the alleged dangerous condition of the elevator.

Portions of paragraphs V and VI of the amended complaint read as follows:

“That the said lunch room was constructed and equipped in said high school building for the purpose of furnishing healthful food to the pupils and teachers of said Broadway high school while they are in attendance at the sessions of said school. That said lunch room was not constructed or maintained for profit, but solely for the purpose of contributing to the physical welfare of the pupils in attendance at said school.”

“That for the convenience of the teachers and others who were required to attend the session of the said teachers’ institute the said county school superintendent made arrangements for the operation of the lunch room and its equipment, which was in said high school building during the period when said institute was in

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session. That said lunch room was operated during said period with the knowledge and consent of said school district, by direction of the said county school superintendent of King county, Washington, not for the profit of said county, but solely in connection with the holding of said institute."

The holding of institutes is required by statute (Rem. Code, §§ 4575 to 4583); and the use of "the schoolroom" for certain public gatherings is authorized by Rem. Code, § 4481. So the school district was empowered to permit the county superintendent of schools to conduct a teachers' institute in Broadway high school building. But we do not think authority can be shown for the conducting of this lunch room for the convenience of persons in attendance at the institute. The holding of teachers' institutes is not a county function. That is manifestly a function of the county school superintendent under the statute.

Appellant contends that a municipal corporation, including a county, is impliedly liable under the maxim of *respondeat superior* for the negligence of its servants and agents in the discharge of its purely corporate powers, as distinguished from those of a governmental nature; and that, the fact of agency being established, the liability of the municipality is determined by the rules which govern the relation of master and servant, unless it is expressly exempted by statute from the application of the rule.

But this presupposes that the county superintendent in this case is the agent of the county and that, as such, the county must respond under the maxim of *respondeat superior* for the tort or negligence of the county superintendent. The relation of principal and agent does not exist, however, between a municipality and the agents it appoints or employs in the execution

of its governmental powers; for they are generally considered public agents or agents of the state and not of the corporation. Its officers directly elected by the people are not its agents. An officer whose duties are prescribed by statute, whose authority is not derived from the corporation, and who is not subject to its control, is not its agent for whose negligence it is liable. Shearman & Redfield on the Law of Negligence (6th ed.), vol. 2, § 291; *Northwestern Improvement Co. v. McNeil*, 100 Wash. 22, 170 Pac. 338; *Township of Vigo v. Com'rs Knox County*, 111 Ind. 170, 12 N. E. 305; Dillon on Municipal Corporations (5th ed.), vol. III, § 974; Thompson on Negligence, vol. 5, §§ 5818 and 5822; Dillon on Municipal Corporations (5th ed.), vol. IV, §§ 1640 and 1655.

The county superintendent being, therefore, a public officer, and not a municipal agent or employee, whatever may be his liability in such case as this, the county has no liability under the maxim *respondeat superior*.

As to the school district, a somewhat different question is presented. Appellant admits that, as to the school district, the county superintendent (although appellant contends that it was the county through the county school superintendent) in holding the teachers' institute was the invitee or licensee of the school district and that:

"The owner of premises owes no duty to a mere licensee as to the condition of such premises save that he should not knowingly let him run upon a hidden peril or wantonly or wilfully injure him."

But while admitting this legal proposition, appellant contends that he was not such a mere licensee. Neither the county school superintendent nor the county was in any sense an invitee of the school district, not hav-

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ing been solicited nor invited to use the building; but the county school superintendent was, by permission, a mere licensee under the statute (Rem. Code, § 4481). It must be conceded that the appellant was the employee of the licensee, and we are unable to find any principle of law which would put him in a different status, such as that of an invitee of the school district itself, or a servant or employee of the school district, or a person of tender years invited either expressly or tacitly to use a dangerous apparatus, or a child using an attractive nuisance, or a volunteer. He comes within none of these classes. The only class he could possibly be placed under would be that of an agent, servant or employee of the licensee of the school district's premises. That being the case, the duty owed toward him was exactly that owed toward the licensee; and that duty and the rule of liability surrounding same is well established by an almost universal array of authorities. We quote and cite a few.

"The general rule is that the licensee goes upon land at his own risk and must take the premises as he finds them. An open hole which is not concealed otherwise than by the darkness of night is a danger which a licensee must avoid at his peril." *Reardon v. Thompson*, 149 Mass. 267.

"The complaint, at most, shows that appellant was no more than a bare licensee, and in such case respondent owed him no duty, except to avoid wilful wrong and wanton carelessness and neglect." *McConkey v. Oregon R. & Nav. Co.*, 35 Wash. 55, 76 Pac. 526.

"An owner owes to a licensee no duty as to the condition of the premises, except that the owner should not knowingly permit the licensee to run upon hidden dangers, or wilfully cause him harm." *Hanson v. Spokane Valley Land & Water Co.*, 58 Wash. 6, 107 Pac. 863.

"In determining respondent's negligence, we must determine the duty it owed to appellant, since negligence occurs only where there is a breach of legal duty. That duty, in the case of licensees and volunteers, is not to wilfully or wantonly injure. Not failing in this duty, responsibility for appellant's injury cannot be fastened upon respondent." *Shafer v. Tacoma Eastern R. Co.*, 91 Wash. 164, 157 Pac. 485.

See, also, *Kroeger v. Grays Harbor Const. Co.*, 83 Wash. 68, 145 Pac. 63; *Gasch v. Rounds*, 93 Wash. 317, 160 Pac. 962.

"It may be assumed, and the assumption is justified by decided cases, that as to persons standing in certain relations to the defendant, a duty rested upon the company to exercise reasonable care in the maintenance and reparation of the machine, and that a failure to perform it would subject the defendant to liability to persons occupying such special relations, who should sustain injury from the omission. But the plaintiff stood in no such relation to the defendant, as imposed upon it the duty to keep the machine in repair. He was, at the time of the accident, in every legal sense, a stranger to the defendant. . . . But in the case before us, there were no circumstances creating a duty on the part of the defendant to the plaintiff to keep the whimsey in repair, and consequently no obligation to remunerate the latter for his injury. The machine was not intrinsically dangerous; the plaintiff was a mere licensee; . . ." *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718.

See, also, *Foster v. Portland Gold Min. Co.*, 114 Fed. 613; *Rhode v. Duff*, 208 Fed. 115; *Weaver v. Carnegie Steel Co.*, 223 Pa. 238, 72 Atl. 552; *Benson v. Baltimore Traction Co.*, 77 Md. 535, 26 Atl. 923; *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800.

Such being the case, under the foregoing authorities, the school district cannot be held liable for such alleged conditions of the elevator as furnished to the county school superintendent.

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Statement of Case.

The trial court correctly sustained the demurrers and dismissed the case.

Judgment affirmed.

MITCHELL, PARKER, MACKINTOSH, and MAIN, JJ., concur.

[No. 15783. Department One. August 4, 1920.]

CHARLES R. COLLINS, *Respondent*, v. OSCAR W. NELSON
et al., *Appellants*.¹

MUNICIPAL CORPORATIONS (384, 389)—USE OF STREETS—NEGLIGENCE—PROXIMATE CAUSE—EVIDENCE—SUFFICIENCY. The evidence sustains findings of the trial court that defendant's negligence was the proximate cause of a collision between his automobile and plaintiff, where it appears that plaintiff, in crossing the street between intersections, threw up his hand as a signal to defendant and immediately walked in a diagonal direction across the street, that the street was clear of other traffic, but that defendant, though having opportunity to pass safely behind him, veered his car to the left side of the street and struck plaintiff with the hub of his right front wheel.

SAME (383)—CONTRIBUTORY NEGLIGENCE—USE OF STREET BETWEEN INTERSECTIONS. While the use of streets by pedestrians between intersections is, by ordinance, a right inferior to vehicles and exacts a higher degree of care, such use is not contributory negligence, in the absence of proof of conduct to relieve defendant of negligence as the proximate cause of the injury.

DAMAGES (79)—PERSONAL INJURIES—PAIN AND SUFFERING. A judgment for \$1,000 for loss of time, pain and suffering is not erroneous because of absence of proof of respondent's earning capacity during the time kept from his work, where it can be sustained by the element of pain and suffering, which is for the trier of the case.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered August 12, 1919, upon findings in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by an automobile, tried to the court. Affirmed

¹Reported in 191 Pac. 819.

Roberts & Skeel and *L. B. Schwellenbach*, for appellants.

Kerr & McCord, for respondent.

MITCHELL, J.—This case was tried without a jury. The court found “that, on March 23d, 1918, the plaintiff was crossing over said Third avenue on foot, from the west side of said street to the east side in a diagonal direction, the view of said street at said place from either direction being unobscured to the driver of defendant’s automobile, or anyone else; that the driver of the defendant’s car failed to keep the proper lookout for the plaintiff, and was driving the said car at an excessive and dangerous rate of speed, and when he observed the plaintiff, failed to use reasonable care in stopping said car and avoiding collision with the plaintiff; and that all of the said acts and negligence were the direct and proximate cause of the collision between the defendant’s automobile and the plaintiff; and the plaintiff at all times acted in a careful and prudent manner; that, at the time when the plaintiff had passed to the east side of the center of said street, the driver of defendant’s automobile negligently struck the plaintiff, knocked him down . . .” The findings are sustained by a clear preponderance of the evidence.

Respondent, going south on Third avenue in Seattle, stopped and parked his car by the west curb, about one hundred and sixty feet south of Virginia street and a like distance north of Stewart street. There were a few other cars standing alongside the same curb, north and south of respondent’s car. There are two street car tracks upon the avenue—one on each side of and near the center of the street. From the street curb to the nearer rail of the nearer street car

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track the distance is seventeen and one-half feet. Having business across the avenue, the respondent, upon alighting on the sidewalk, passed around in front of his car into open vision upon the avenue, paused, looked south and observed no traffic, then looked north and saw appellant's automobile crossing Virginia street, traveling south along the right-hand or west-erly side of the avenue. There was no other traffic of any kind at that time on the avenue between the two cross streets mentioned. Upon observing appellant's automobile approaching, respondent threw up his hand as a signal to the driver, and immediately walked at a fairly rapid pace in a straight line diagonally across the avenue toward a point about sixty feet further south. Shortly the automobile ran upon him, over on the east side of the avenue, as he reached the west rail of the east street car track, and knocked him down, causing the injuries complained of. In spite of ample opportunity, by keeping on the right-hand side of the street, to have passed safely behind respondent, as testified to by all the witnesses to the accident other than the driver, it appears that, from a point an appreciable distance to the north, the driver commenced to veer his car toward the east in the direction respondent was going, or, as a disinterested witness expressed it, "seemed to kind of follow Mr. Collins," and struck him over on the east side of the avenue, not with the left nor front of the automobile, but with the hub of the right front wheel.

We are not impressed with the claim of contributory negligence. A pedestrian is not prohibited by the ordinance of the city from the use of the streets between intersections and crossings. It makes his right to the use of such places inferior to the rights of vehicles and exacts from him a higher degree of care than at street

intersections and crossings where he has the right of way over vehicles. Admitting the superadded care imposed by the ordinance upon pedestrians between street intersections, we find in the present case no proof of conduct on the part of the respondent to relieve the appellant of its negligence as the proximate cause of the injury.

It is further contended that, because of the absence of proof as to the earning capacity of respondent during the time he testified to have been kept from his work, the judgment for \$1,000 for loss of time, pain and suffering is erroneous and must be set aside. The judgment is in general terms and mentions no element of damage upon which it is based. The case is tried *de novo* by us. There are allegations and proof of pain and suffering entirely sufficient to sustain the amount of the award. While there is an allegation and also proof of loss of time on the part of respondent, without any testimony of the value thereof, we adopt the plan, obviously pursued by the trial court, of not considering the loss of time, as such, in fixing the amount of respondent's recovery, but confine it, so far as the \$1,000 is concerned, to the element of pain and suffering, a damage not susceptible of being estimated in money by direct proof, but which must be left to the judgment of the trier of the case.

Judgment affirmed.

HOLCOMB, C. J., PARKER, TOLMAN, and MAIN, JJ., concur.

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Opinion Per MOUNT, J.

[No. 15780. Department Two. August 4, 1920.]

EMPSON PACKING COMPANY, *Appellant*, v. LAMB-DAVIS
LUMBER COMPANY *et al.*, *Respondents*.¹

SALES (1)—CONTRACT—EXECUTION—SIGNATURE OF PARTIES. A contract for the sale of box shooks was incomplete and not enforceable between the parties, where the original draft of the contract was reduced to writing and signed by one of the parties and forwarded to the other, which other, before signing, made changes therein and returned it, and the first party, though accepting the changes, made other changes and insisted upon a contract without interlineations and erasures, and after still other changes, it was agreed that a contract containing the terms upon which the parties had agreed should be signed by the presidents of the respective companies, which was never done.

PLEADING (173)—ISSUES, PROOF AND VARIANCE—EVIDENCE ADMISSIBLE UNDER GENERAL DENIAL. In an action for breach of contract to deliver box shooks, a letter tending to show that the original draft of the contract had been accepted by neither of the parties is admissible under a general denial.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered October 4, 1919, upon findings in favor of the defendants, dismissing an action on contract, tried to the court. Affirmed.

Pershing, Nye, Fry & Tallmadge, and *Robert G. Bosworth*, for appellant.

Fred B. Morrill, for respondents.

MOUNT, J.—The purpose of this action was to recover \$14,138.63 for an alleged breach of a written contract between the plaintiff and the defendants. The complaint alleged in substance that, on the 3d day of November, 1916, the plaintiff and defendant entered into a written contract by the terms of which the defendant Lamb-Davis Lumber Company bound itself to

¹Reported in 191 Pac. 833.

furnish to the plaintiff all its requirements of box shooks, not exceeding a total of one million boxes, the various types of boxes and the width of lumber to be used being specified in the contract; that thereafter, in accordance with the terms of the contract, the plaintiff sent specifications and orders for more than two hundred thousand boxes as required by the contract; that the defendant refused to ship the said box shooks and the plaintiff was required to purchase the same in the open market at a loss of more than \$14,138.63 over the agreed price, according to the terms of the contract. The defense was a general denial. Upon these issues the case was tried to the court without a jury, and resulted in a judgment of dismissal, and plaintiff has appealed.

The facts are as follows: In the year 1913, the Lamb-Davis Lumber Company, through its agent, Mr. J. P. Packham, entered into a three-year contract with the appellant for the sale of box shooks. In October, 1916, when the prior contract was about to expire, the Packham Sales Company wired the Lamb-Davis Lumber Company asking quotations on box shooks to meet the appellant's future requirements. As a result of this telegram a written contract was prepared and dated November 3, 1916. This contract was signed by the appellant and handed to the respondent's agent, Mr. Packham, who sent the contract to the respondent for signature. Upon receipt of this contract, the respondent made certain changes therein and returned the contract, signed as changed, with a letter dated November 17, 1916, stating these changes and erasures as follows:

“ ‘When boxes are shipped without any printing on the ends or sides, the party of the second part is to be allowed twelve and a half cents per hundred boxes for

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all such blank shooks shipped,' and also added to the sentence relative to the prices, that shooks 'are to be F. O. B. Longmont, Colorado, or common points, based on the present rate of freight,' and also changed the paragraph regarding the material from which the shooks were to be manufactured by changing the words 'Oregon or Washington white pine' to read 'Western pine' and in the paragraph regarding the loading of cars inserted the words 'or rope' in the sentence providing that all shooks should be thoroughly bound with strong wire.' "

The words "party of the second part," above quoted, refer to the appellant. On receipt of this letter, the appellant answered as follows:

"Your letter of the 17th has been forwarded to me at this place from our Longmont office, also contract for box shooks which I signed before I left Longmont. I think it would look better to have a new contract entirely instead of so many changes in the old one. I am therefore sending you them in duplicate. I see no objections to making the various changes you speak of, although I want them a little clearer so long as you suggest that they be made at all. . . . In regard to adding that your price delivered to our factory is based on present rate of freight, will say that it is satisfactory to us, but to make that a little clearer we have stated we will pay the excess freight if any over the present rate, and if the rates decline we were to have the advantage of the decline. . . . In regard to the material as we specified it in the contract, our stenographer copied contract we last made with you. If you prefer to use the words 'Western pine,' however, we have no objection to your doing so; but to make it clearer we have added, 'the material furnished under this contract is to be of the same kind and of the same quality as furnished to us during the years 1914, 1915 and 1916.' . . . In regard to tying the boxes, we formerly had them tied with rope and a great many bundles would get broken and boxes would be

damaged in transit; for that reason we changed our contract to read wire instead of rope, but as you are responsible for the delivery of goods to us in good order you can tie them any way you see fit. Any expense that would accrue to us in handling by reaching us in bad condition will, of course, be charged to you. I believe this covers all of the points that you speak of."

To this letter the Lamb-Davis Lumber Company replied by letter of December 18, 1916, as follows:

"We are enclosing herewith revised copy of our canning case contract, duly signed by Mr. George L. Gardner, as attorney in fact for the Lamb-Davis Company. The delay in returning this contract has been caused by Mr. Gardner having just returned from the east, and before signing the contract had it examined by our attorneys, who recommended the changes which we have made.

"We have taken the liberty to make changes as suggested by the attorney and have changed the wording to make more clear the intent of the different paragraphs changed. For instance, the paragraph relative to dating, in the old contract, specified that shipments might begin at any time desired after February 1st of each year, provided the first car shipped was billed May 15th and all cars shipped after that date to be billed as much later than May 15th as the various shipments are later than the first shipment. We have changed that paragraph to read that the party of the first part may begin shipments at any time between February 1st and May 15 of each year, provided that all cars shipped prior to May 15th bear May 15th dating, and all subsequent shipments bear regular dating. This is the intent of the paragraph mentioned and is the manner in which it has always been interpreted by both parties of the contract. . . . Would like to have you acknowledge receipt of the contract and your acceptance of the changes, which we will attach to our copy of the contract in order to show that the changes have met with your approval."

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To this letter appellant replied by letter dated December 28, 1916, which letter contained the following:

“Your letter of the 18th, enclosing contract, received, and it would have had an earlier reply had it not come along the holiday season.

“We see no objection to the minor changes you have made in the contract. There is one clause where you say that deliveries shall be within a reasonable length of time after receipt of the order. What might seem reasonable to you might be very unreasonable to us, and we think you should specify a certain amount to be delivered each week after receipt of order, although we will not insist upon that, as we have had no difficulty until last fall, and you tell us that you are in shape to ship more promptly in the future. Our attorney tells us, though, that the contract should be signed by president of your company and the official seal should be attached. We therefore return them to you for this correction. Kindly get them to us with this change made as soon as possible. We will return and attach our seal as soon as possible. We seem to have considerable difficulty to get these contracts in good shape this year, but as they are running for some time we feel that we ought to be careful to have them right.”

In answer to this letter, the respondent replied by letter dated January 3, 1917, in part as follows:

“We acknowledge receipt of your favor of the 28th returning contracts, and wish to advise that it will be some time before we can return these contracts to you, as the president of this company is in the east, and the contracts will have to be sent to him for his signature.”

These contracts appear never to have been signed. The appellant, relying upon the first draft of the contract, which was signed, sought to order box shooks as therein required, and the respondent declined to furnish box shooks under the contract. Appellant then purchased the box shooks in the open market. This action resulted.

Upon the trial of the case, the trial court was of the opinion that the first draft of the contract was a completed contract and that the subsequent modifications amounted to an abrogation of the original contract. We are of the opinion that the trial court was in error in holding that the first draft of the contract, which was signed by both parties, was a completed contract. We think it is clear from the evidence that a completed contract was never executed by the parties thereto. It is plain from the last letter above quoted, which was written by the appellant to the respondent, that it was the intention of the parties to have a formal written contract, signed by the presidents of both companies, with the seal attached. No such contract was ever signed. We think the evidence is plain to the effect that the parties were endeavoring to reach a satisfactory agreement. The original draft of the contract was reduced to writing. It was signed by one of the parties and forwarded to the other. The other, before signing, made certain changes therein, signed it and forwarded the contract with these changes to the other party. The other party, while accepting the changes, made other changes and insisted upon a contract without interlineations and erasures. It was then sent to the other party and additional changes were made therein, and it was finally concluded that, after the parties had agreed upon all of the terms of the contract, it should be signed in a certain way by the president of the respective companies. It was never so signed. We are of the opinion, therefore, that there was no completed, enforceable contract entered into between the parties.

In the case of *Schulze v. General Electric Co.*, 108 Wash. 401, 184 Pac. 342, quoting from an earlier case, we said:

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"An offer by one party assented to by the other will generally constitute a contract, but the assent must comprehend the whole of the proposition. It must be exactly equal to its extent and terms, and must not qualify them by any new matter. A proposal to accept, or an acceptance of, an offer on terms varying from those proposed, amounts to a rejection of the offer. *Baker v. Johnson County*, 37 Iowa 186."

Under this rule, when the original contract signed by the appellant was sent to the respondent and changes made therein, that amounted to a rejection of that proposed contract. And so all the way through, the different changes by the different parties amounted to rejections of those provisions previously proposed. When all the terms were finally agreed to, the appellant insisted that the completed contract should be signed by the president of the respondent company, with the seal attached.

In the case of *Sparks v. Mauk*, 170 Cal. 122, 148 Pac. 926, it was said:

"It is next asserted that the contract contemplated a signing by both parties; that the plaintiff did not sign; that the contract is not complete and therefore unenforceable. It is the undoubted rule that where the contract contemplates the execution of it by signing, either party has the right to insist upon the condition, and mere acts of performance on the part of one who has not signed will not validate the contract."

In *Aftergut Co. v. Mulvihill*, 25 Cal. App. 784, 145 Pac. 728, it is said:

"And as it was the expressed intention of the parties that it should be reduced to writing and signed by them, certain it is that, this stipulation not having been performed, the contract cannot be regarded as binding on either of the parties."

In *Barber v. Burrows*, 51 Cal. 404, the rule is to the same effect. See, also, *Morrill v. Temaha Consol. Mill*

& Mining Co., 10 Nev. 125; *McDonnell v. Coeur d'Alene Lumber Co.*, 56 Wash. 495, 106 Pac. 135.

Since the contract was never completed, it was not enforceable by one against the other. The trial court seemed to be of the opinion that *Hunter v. Byron*, 92 Wash. 469, 159 Pac. 703, controlled, and that the mere signing of the original contract by the parties constituted an effective agreement. That, no doubt, would have been true if there had been no modification of the terms of the original contract. In the case of *Hunter v. Byron*, the contract was acted upon, and for that reason made a binding contract. "Where the parties act under a preliminary agreement, . . . they will be held to be bound notwithstanding the fact that a formal contract has never been executed." 6 R. C. L., p. 619.

The appellant argues that the trial court erred in receiving in evidence the letters above referred to, because the answer of the respondent was a general denial and there was no affirmative defense to the effect that the original contract had been abrogated. The effect of these letters was to show that the original draft of the contract had never been accepted by either of the parties, and therefore, we think, were admissible in evidence under a general denial. In this view of the case it is unnecessary to notice the other assignments of error.

The judgment appealed from must be affirmed because there was no completed contract.

FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

HOLCOMB, C. J. (concurring).—I concur in the result, agreeing with the trial court that the first draft of the contract was a completed contract, as to form and substance. The subsequent correspondence resulted in

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finally materially modifying the original contract, but which modifications were not executed in manner and form as contemplated and required by the parties, leaving them without a complete contract in writing.

[No. 15762. Department One. August 4, 1920.]

B. A. LEWIS, *Respondent*, v. ELLIOT BAY LOGGING
COMPANY, *Appellant*.¹

FRAUDS, STATUTE OF (34)—SALE OF GOODS—MEMORANDUM—SUFFICIENCY. A letter written by the seller of logs, offering to let the buyer have "fir" at a certain price is insufficient as a memorandum to satisfy the statute of frauds, since it failed to designate the quantity to be sold.

SAME (34)—SALE OF GOODS—MEMORANDUM—SUFFICIENCY. Where a memorandum, signed by the seller of goods, failed to designate the quantity to be sold, he cannot be held liable upon the letter of the buyer which, for the first time, sufficiently designated the quantity of the subject-matter of the sale, since the seller could not be charged upon a memorandum which he did not sign.

SAME (34, 58)—SALE OF GOODS—MEMORANDUM—PAROL EVIDENCE TO SHOW ESSENTIALS. The quantity of the subject-matter of a sale of goods being an essential term of the memorandum of sale, parol evidence is not admissible to show that the word "fir," used in a letter written by the seller to the buyer, referred to a raft of logs and the quantity thereof.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered October 18, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Byers & Byers, for appellant.

George Harroun, for respondent.

MAIN, J.—The purpose of this action was to recover damages for failure to deliver logs which it is claimed

¹Reported in 191 Pac. 803.

the defendant had sold to the plaintiff. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff in the sum of \$241.66. The defendant timely made motions for judgment notwithstanding the verdict and for a new trial, both of which were overruled, and judgment was entered upon the verdict. The defendant appeals. The essential facts may be stated as follows:

The appellant is a corporation organized under the laws of the state of Washington, engaged in the logging business at Dabob, Washington. The respondent is engaged in the business of buying and selling logs. On the 25th day of April, 1917, the respondent visited Dabob and looked over a boom of logs owned by the appellant, consisting of about 300,000 feet, and had a conversation with the president of the appellant company with reference to purchasing these logs, together with sufficient logs to be brought from the woods to constitute a raft. The logs at the time had not been rafted. Subsequently the 300,000 feet in the boom were rafted with other logs brought from the woods, and in the raft as made up there was approximately 470,000 feet. On the day following the conversation mentioned, one of the trustees of the appellant wrote respondent a letter which contained the following:

“Having been away from camp the day you was here and Mr. Leber sold fir to you for \$7-10-13 . . . so therefore under the condition we let you have fir at \$7-10-13 delivered in Everett or Seattle . . .”

After receipt of this letter and on April 28, the respondent wrote appellant a letter containing the following:

“Your letter of the 26th inst., is received, in which you agree to let me have the raft of fir logs to be delivered in Seattle by you at \$7.00-\$10.00 and \$13.00,

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. . . and I will take the fir logs as per your offer at the above prices . . .”

It should be noted that, in appellant's letter, the subject-matter of the sale is referred to simply as “fir.” There is no mention of the quantity. In the respondent's letter, for the first time, the subject-matter is referred to as “a raft of fir logs.” As above stated, the logs were not delivered and, since the price of logs had advanced, this action was brought for the purpose of recovering damages.

The first question to be determined is whether the letters referred to constitute a sufficient memorandum to satisfy the statute of frauds. One of the essentials of a memorandum under the statute is that it shall designate the subject-matter of the contract.

Considering, first, the letter signed by the appellant, there is no designation therein of the quantity, but the subject of the sale is referred to simply as “fir.” The rule as stated in *Mechem on Sales*, vol. 1, § 437, is that “the note or memorandum must also show what goods were sold and in what quantities. This rule requires that the goods sold shall be set out either by name or by such description as will enable them to be ascertained without other recourse to parol evidence to identify the goods or apply the description to them.” Under this rule it is necessary that the note or memorandum show in “what quantities” the goods are sold. In 25 R. C. L. 648, the rule is stated substantially the same as in *Mechem*, and is as follows:

“In case of contracts for the sale of goods the memorandum must designate with reasonable certainty the subject-matter of the sale, and where the sale is of a quantity of a commodity the quantity must be stated with reasonable certainty as well as its kind.”

This rule requires that the quantity be designated in the memorandum. The letter written by the appellant,

which referred to the subject-matter of the sale as "fir," did not sufficiently designate the quantity. The respondent, however, argues that the two letters should be considered together. It is true that, where the memorandum consists of telegrams or letters, they may be construed together, providing they are sufficiently connected by reference. In the letter of the respondent, the quantity of the subject-matter, namely, "a raft of fir logs," is for the first time designated. Under the authorities above cited, this was one of the essentials of the memorandum.

The question then arises, the memorandum of the appellant, which is sought to be charged, not sufficiently describing the subject-matter, can it be held upon the letter of the respondent, which for the first time contains that essential term of the contract? Respondent cites a number of cases upon this question, all of which have been carefully read and considered, but none of them would sustain a holding that the appellant could be charged upon a memorandum which it did not sign and which designated the quantity, where the writing signed by the appellant did not sufficiently designate the subject-matter in that respect. They are cases where the party sought to be charged signed a memorandum which contained all the essential terms of the contract and which was simply accepted by the opposite party, or cases where the party sought to be charged had accepted the terms as they were written by the opposite party. They are, therefore, not applicable to the facts in the case now before us. The respondent also cites a number of authorities to sustain his contention that the word "fir" as used in the letter of the appellant was a sufficient designation of the subject-matter and that oral testimony was admissible for the purpose of showing that that word referred

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to a raft of logs and the quantity thereof. In all the cases cited, with possibly one exception which will be specially noticed, the memorandum contained language which made the quantity reasonably certain. It cannot be said that simply the word "fir" bears any relation to the quantity. We have not overlooked the rule that the situation of the parties and the surrounding circumstances at the time when the contract was made may be shown for the purpose of applying the contract to the subject-matter, but this rule does not go to the extent of permitting an essential term of the memorandum to be shown by oral testimony.

The case of *Brewer v. Horst & Lachmund Co.*, 127 Cal. 643, 60 Pac. 418, is probably the most closely in point of any case cited by respondent, but that case when carefully read is distinguishable. There, a telegram to a hop dealer by his agent, stating "bought thirteen at eleven five-eighths net you; confirm purchase by wire," with the reply by the dealer to the effect that "we confirm purchase eleven five-eighths cents, like sample," was held to constitute a sufficient memorandum, since it was shown by parol evidence that, according to the custom of the hop business, the words were understood by the parties to mean an agreement to purchase a certain quantity of hops of a certain grade for a certain price. There is no showing in the present case that the word "fir," according to the custom of the business, had any particular meaning. The case of *Wright v. Seattle Grocery Co.*, 105 Wash. 383, 177 Pac. 818, is cited and relied on by both parties, but that case does not discuss or determine the question here involved. There the memorandum designated the subject-matter as "1 car" of flour, and it was held that the parol evidence was admissible to explain what the term "1 car" of flour meant and that

the price agreed upon was in full for that quantity. There is nothing in that case which would sustain a holding that, where a memorandum does not sufficiently designate the subject-matter, in that it does not fix the quantity with reasonable certainty, this fact may be shown by oral evidence.

The judgment will be reversed, and the cause remanded with directions to the superior court to dismiss the action.

HOLCOMB, C. J., PARKER, BRIDGES, and MITCHELL, JJ., concur.

[No. 15738. Department One. August 6, 1920.]

H. M. RAMEY, JR., *Respondent*, v. CLIFFORD GRAVES
et al., *Appellants*.¹

DAMAGES (75)—MEASURE OF DAMAGES—BREACH OF CONTRACT—LOSS OF COMPENSATION FOR SERVICES. Where the compensation agreed to be paid an attorney is contingent on the successful result of the suit, the measure of damages for a wrongful discharge from employment is the reasonable value of the services rendered, and not the contingent fee agreed upon.

ATTORNEY AND CLIENT (44)—COMPENSATION—BREACH OF CONTRACT—REASONABLE VALUE OF SERVICES—EVIDENCE. No recovery can be had by an attorney for a wrongful discharge from employment under a contingent fee contract where no evidence was offered or received to prove the reasonable value of the services rendered up to the time of the discharge; nor is a recovery sustained by proof of expenditures by the attorney during the time of his employment, the evidence only being offered to show what was done under the contract, and not as special damages.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 13, 1919, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

¹Reported in 191 Pac. 801.

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Opinion Per MAIN, J.

Geo. H. Rummens, for appellants.

H. M. Ramey, Jr., *pro se* (*J. Speed Smith*, of counsel), for respondent.

MAIN, J.—By this action the plaintiff seeks to recover upon a contract for services rendered as an attorney. The cause was tried to the court without a jury, and resulted in findings of fact, conclusions of law and judgment sustaining the right to recover in the sum of \$2,000. From this judgment, the defendants appeal. The respondent is an attorney at law practicing his profession at Seattle, Washington. The appellant, W. I. Graves, is the guardian of the person and estate of Clifford Graves, a minor. On or about October 30, 1915, the father, mother and a brother of Clifford Graves were injured in a railway accident at or near Sand Point, Idaho. All of them died as a result of such injury. The parents of Clifford Graves, prior to their decease, were residents of the city of Seattle. On November 8, 1915, W. I. Graves, in King county, Washington, was duly and regularly appointed guardian *ad litem* for Clifford Graves for the purpose of prosecuting an action or actions against the Northern Pacific Railway Company. On the day following, he was appointed special administrator of the estate of Minor Graves and Clara Graves, the deceased parents of Clifford Graves. On the 10th day of November, W. I. Graves, in his own behalf and as guardian *ad litem* for Clifford Graves, a minor, and special administrator of the estates of Minor Graves and Clara Graves, deceased, entered into a written contract with the respondent by which he was employed to prosecute an action against the railway company. The fee which the respondent was to receive by this contract was to be contingent upon a recovery or

a settlement. Subsequently Graves was appointed guardian of the person and estate of Clifford Graves, a minor, in King county, Washington.

Prior to the time that the respondent had instituted an action which was contemplated by the contract, the maternal grandfather, residing at Portland, began an action, as guardian *ad litem*, in the state of Idaho for the purpose of recovering from the railroad company damages for the death of Clifford Graves' parents. In this action the maternal grandfather was represented by attorneys other than the respondent. After the action had been begun, W. I. Graves, being represented by the respondent, was appointed, in the state of Idaho, guardian of the person and estate of Clifford Graves, a minor, and in this capacity filed a petition in the action then pending in the state of Idaho, asking that he be substituted as party plaintiff and that the respondent be substituted as an attorney in the action. While this petition was pending and before it had been determined, W. I. Graves discharged the respondent and refused to permit him to proceed further under the contract. The action in the state of Idaho proceeded to trial and judgment. After the respondent had been discharged, W. I. Graves, the guardian, consented that the petition which he had filed in the action should be dismissed. The amount of recovery in the Idaho action was \$12,000. The contract sued upon in this case provided that, in the event of recovery in an action, respondent was to be entitled to fifty per cent of the judgment. This action was instituted for the purpose of recovery upon the contract.

The respondent claims that, after W. I. Graves was appointed guardian of the person and estate of Clifford Graves for the state of Washington, he, in that capacity, ratified the contract. It will be assumed,

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but not decided, that the contract was a valid one. The contract in this case being for a contingent fee and the respondent being discharged or prevented from rendering the services which he had contracted to perform, the first question that arises is, What is the correct measure of damages in such a case? The rule is that, where the compensation of an attorney is to be paid to him contingently on the successful prosecution of a suit and he is discharged or prevented from performing the service, the measure of damages is not the contingent fee agreed upon, but reasonable compensation for the services actually rendered. 6 Corpus Juris 725; *Pratt v. Kerns*, 123 Ill. App. 86; *Joseph's Adm'r v. Lapp's Adm'r*, 25 Ky. Law 1875, 78 S. W. 1119; *Western Union Tel. Co. v. Semmes*, 73 Md. 9, 20 Atl. 127; *Harris v. Root*, 28 Mont. 159, 72 Pac. 429; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797.

In the last case cited it was said:

“If the compensation agreed upon is contingent on the successful result of the suit, the measure of damages is not the contingent fee but the reasonable value of the services rendered.”

From this it follows that there can be no recovery in this case in the absence of evidence showing what was the reasonable value of the services rendered by the respondent under the contract up to the time he was discharged or prevented from further proceeding in the case. As we understand it, the theory of the action, as made by the pleadings and as tried in the superior court, was a claimed right of recovery under the contract; the respondent being satisfied to waive the full amount to which he would be entitled under the language of the contract and accept a judgment, as stated in the complaint, for \$3,000, and as stated upon the trial, for \$2,000. No evidence was offered

or received for the purpose of proving what was the reasonable value of the services rendered by the respondent up to the time he was discharged. This being true, there is nothing on which to base a recovery. Over the objection of the appellants, there was introduced certain items of expenditures by the respondent during the time he was proceeding under the employment. Whether any of these items could be recovered, it is not necessary here to determine. They were offered only for the purpose of showing what had been done under the contract, and as stated by the attorney for the respondent upon the trial, "we are not seeking to collect these as special damages." This case differs from *Schultheis v. Nash*, 27 Wash. 250, 67 Pac. 707, in that there the services for which the attorneys had been employed were substantially, if not entirely, completed at the time of the discharge or attempted discharge.

There being no evidence by which the reasonable value of the services rendered by the respondent prior to his discharge can be determined, there is no alternative but to reverse the judgment and remand the cause to the superior court with direction to dismiss the action. It is so ordered.

HOLCOMB, C. J., PARKER, TOLMAN, and MITCHELL, JJ.,
concur.

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[No. 15823. Department Two. August 6, 1920.]

*In the Matter of the Estate of GEORGE ADIN.*LUCY SELLARS *et al.*, Respondents, v.ANNA EVELYN ROOT *et al.*, Appellants,SEVERENE OLSON *et al.*,*Defendants.*¹

APPEAL (172)—TIME FOR TAKING—PREMATURE APPEAL. An appeal from part of a judgment is not premature because taken prior to the time the right to file a motion for new trial expired, where it appears that the parties moving for the new trial were not aggrieved by the part of the judgment appealed from, which was in their favor.

SAME (174)—EFFECT OF MOTION FOR NEW TRIAL—TIME FOR TAKING. A motion for new trial is not timely made, as required by Rem. Code, § 402, where the court mailed to counsel copies of findings of fact and conclusions of law announcing his decision, together with a letter stating that the originals would be filed with the clerk on a certain date, which was done, and the motion for a new trial was not made within two days after such filing.

Motion to dismiss an appeal from a judgment of the superior court for Skagit county, Hardin, J., entered September 17, 1919, in an action to contest a will. Denied.

Robert A. Devers, R. V. Welts, Coleman & Gable,
and *Edward Judd*, for appellants.

FULLERTON, J.—On September 16, 1916, one George Adin, then a resident of Skagit county, died, leaving an estate therein consisting of real and personal property. Adin left a will in which he named one Milo A. Root as one of his principal beneficiaries, naming him also as the executor of the will. The will was duly probated and letters were issued to Root, appointing and confirming him as executor of the estate. Root took up his duties as such executor and was proceeding with

¹Reported in 191 Pac. 839.

the administration of the estate in accordance with the terms of the will, when he died; his death occurring on January 11, 1917. Thereafter Severene Olson and Edward Crandell were appointed administrators of the estate with the will annexed.

On September 29, 1917, the respondents, heirs at law of George Adin, instituted proceedings in the court where the administration was pending in contest of the will, averring in their petition want of mental capacity on the part of Adin to make a will, and undue influence exercised over him by Root and others of the devisees whereby he was induced to name them as devisees. The heirs at law of Root were made parties defendant as the representatives of his interests, and they, with others of the devisees, took issue on the allegations of the petition. The cause was tried before a judge called in from a neighboring county. At the conclusion of the trial, the judge took the cause under advisement, and later on prepared findings of fact and conclusions of law announcing his decision. Copies of these he caused to be mailed to counsel representing the several parties to the proceedings, accompanied by a letter to the effect that the original of the findings and conclusions would be filed with the clerk of the court on September 8, 1919. The original findings and conclusions were forwarded to the clerk, and that officer filed them as directed on the day named in the letter of the judge. Two days later the contestants filed exceptions to such of the findings and conclusions as they deemed adverse to their interests. The findings confirmed the bequests as to all of the devisees, save the bequest to Root. A decree in accordance with the conclusions of the judge was entered in the cause on September 17, 1919, and at that time the heirs at law of Root gave notice in open court that they ap-

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pealed from that part of the decree which held the devise invalid as to the devisee Root. On the next day the contestants filed a motion for a new trial, basing their motion upon certain of the statutory grounds found in Rem. Code, § 399. The motion was directed to the entire cause; the issues therein determined in favor of the contestants as well as the issues determined against them.

The appellants afterwards perfected their appeal in this court, and the contestants now move to dismiss the appeal on the ground that it was prematurely taken. In support of the motion, the contestants argue that, since the statute grants the right to move for a new trial in causes of equitable cognizance as well as those legal, a motion therefor timely made stays the operation of the judgment and prevents it from becoming final until the motion is disposed of, and that, since appeals may be taken only from final judgments, any appeal taken prior to the time the right to file such a motion expires is premature.

But to this we think there are at least two sufficient answers. First, it is only a party aggrieved by a verdict or decision who may move for a new trial (Rem. Code, § 399), and the parties moving in this instance are not aggrieved by that part of the judgment from which this appeal is prosecuted. This part of the judgment is in their favor. The issues respecting it were determined in accordance with their contentions and in accordance with the prayer of their petition. By a new trial they could obtain no more favorable relief than they now have, and plainly have no grievance because of the judgment of which they can legally complain.

Second, the motion was not timely made. By Rem. Code, § 402, it is provided that the party moving for

a new trial must, within two days after notice in writing of the decision of the court, where the action is tried without a jury, file with the clerk and serve upon the adverse party his motion for a new trial, designating the grounds upon which it is made. In this instance, notice of the decision of the court and of the day the findings and conclusions evidencing the decision would be filed with the clerk was given the contestants long prior to the entry of the judgment. That they had actual notice of such filing in time to file such a motion prior to the entry of the judgment is evidenced by the fact that, within two days after the findings and conclusions were filed, they took formal exceptions thereto in writing and filed the same in the cause. It may be that they were entitled to delay the motion until the findings and conclusions were made certain by a formal filing with the clerk, but plainly they were required to file their motion for a new trial within two days after such time. *State ex rel. Payson v. Chapman*, 35 Wash. 64, 76 Pac. 525. It is true we have held that, in actions of equitable cognizance, formal findings of fact and conclusions of law, while proper, are not necessary; and have held, also, that, where a judgment in such an action is filed without findings, or where findings are made but are filed at the same time the judgment is filed, a motion for a new trial is in time if made within two days after notice thereof is given, although made after the entry of the judgment. But the principle involved in these cases does not aid the contestants here. The decisions are founded on the necessities of the case; it is so held that substantial rights granted by statute may not be denied a litigant. But where necessity ceases, the rule ceases. Where a litigant can comply with the requirements of the statute, he must comply.

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Statement of Case.

For the reasons stated, we conclude that the motion to dismiss must be denied, and it is so ordered.

HOLCOMB, C. J., MOUNT, TOLMAN, and BRIDGES, JJ.,
concur.

[No. 15800. Department Two. August 6, 1920.]

W. H. MEAD, *Appellant*, v. CHELAN COUNTY,
Respondent.¹

HIGHWAYS (64)—INJURIES TO TRAVELER—NOTICE OF DEFECT. A county is not liable for injuries sustained by a traveler through a skidding of his wagon off a curve on a steep mountain road by reason of the dangerous and slippery condition of the roadway caused by the freezing of water escaping from an irrigation ditch, there being no proof that the county had knowledge of the existence of water in the ditch at that time of the year, and it not appearing that at other times the water and mud caused thereby created a dangerous condition.

SAME (65)—CONTRIBUTORY NEGLIGENCE—APPARENT DANGERS—EVIDENCE—SUFFICIENCY. The driver of a heavy team and wagon carrying a very heavy load down a road containing sharp curves and steep grades is guilty of contributory negligence precluding a recovery for injuries sustained through the skidding of the wagon off a sharp curve covered with ice, he being familiar with the locality and having actual notice of the ice in the roadway before coming to the place of the accident, and so fully appreciated the probability of danger as to stop his team and examine his brakes before entering upon the curve.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered April 11, 1919, upon granting a nonsuit, dismissing an action for injuries sustained through defects in a county road. Affirmed.

Ludington & Shiner, for appellant.

W. F. Whitney, for respondent.

¹Reported in 191 Pac. 825.

TOLMAN, J.—On November 23, 1916, appellant, who was plaintiff below, was engaged in hauling apples from his farm on the Wenatchee Heights to the city of Wenatchee. He traveled what is known as the "Snake Road," because of its curves, with a load of some two and one-half tons, on an ordinary two and three-fourths skein farm wagon drawn by a team weighing about 2,200 pounds. The road at this point passes along a ridge or hog-back for a few hundred feet, and at this point there is an irrigation ditch above the road, fed from a flume. Occasionally in the history of the road, this ditch has broken or become stopped up and overflowed so as to permit the water to escape into the road, and at such times some passerby or the road supervisor, under general orders from the county commissioners, has removed the flume, swinging it back so that the water escaped in some other direction, thus stopping the flow into the road. The evidence as to notice to the commissioners and orders from them to remove the flume is somewhat hazy at best, but even if direct and positive, it would have advised them of inconvenience merely, not danger to the traveling public.

Two days before the time in question, appellant had traveled this same road and found no water in it, and on the morning of the accident he drove down the road, past the flume and ditch, descending a grade of approximately two per cent, and there found that water had escaped into the road and followed down the left wheel track, causing mud and thin ice through which the wheels of the wagon readily cut. Continuing down the road, he came to a place where the road curved sharply so as to make a switch-back and fell off rapidly into a descent of ten per cent or more, and on this curve the roadbed was hard and impervious so that

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water, instead of following the wheel track as theretofore, spread over the entire roadway, and as so spread out it froze solidly, forming a slippery surface through which, it developed, the wheels would not cut and upon which the horses could get no secure footing. Before entering upon the curve and the steep grade, appellant stopped his team, looked after his brake and equipment to see that everything was in order, and then started forward. As the team and wagon began to swing around the curve on the slippery, frozen, icy surface, the wagon skidded, the horses lost their footing, and team, wagon and driver were carried off the road and down the sheer mountain side, appellant sustaining severe injuries for which he sues. On the trial below, at the close of appellant's case, a nonsuit was ordered, from which result this appeal is taken.

The nonsuit appears to have been granted on the theory that the unsafe condition of the road was not shown to have existed for a sufficient length of time to put the county on notice. It does not appear that either the running water in the roadway or the mud caused thereby was ever in itself a menace to one using the road. On the contrary, it is made to appear that some mud and water had a tendency to make the wheels cut in, and this actually made the roadway safer and less likely to produce such an accident as occurred here. But it is argued that, if the condition happened in freezing weather, the county was bound to anticipate that the water would freeze, form ice, and become dangerous. The fallacy of this argument lies in the lack of proof in the case that the county commissioners knew, or had any reason to anticipate, that there would be water in the flume or ditch after the close of the irrigation season and during that portion of the year when freezing weather was to be ex-

pected. It is to be borne in mind that this was a somewhat remote mountain road serving but few families, and, in the nature of things, the commissioners could not be required to give it constant or even frequent inspection, but might rely upon the users of the road or those living in the neighborhood to give them notice of any unusual conditions which would render the road unsafe. The facts fall far short of what is required for the application of the rule announced in *Blankenship v. King County*, 68 Wash. 84, 122 Pac. 616, 40 L. R. A. (N. S.) 182, upon which appellant seems to rely.

But without continuing the discussion upon this point, we think, under the facts shown, that appellant should be held guilty of contributory negligence or assumption of risk. Considering the size of his wagon and the weight of his team, he was carrying a very heavy load upon a road abounding in sharp curves and steep grades with which he was entirely familiar, and must have known that he was loaded to the extreme limit of safety under favorable conditions. He had actual notice of the presence of the water and ice in the road before coming to a place where any prudent person, familiar with conditions as he was, must have known that those conditions might prove dangerous, and he so far appreciated the probability or possibility of danger as to then stop his team and look to his equipment. This all occurred in broad daylight in the middle of the forenoon, and it is not shown that he could not and did not see that the water had spread thinly out and frozen over the whole roadway immediately ahead of him. He must, in fact, have so seen had he looked, and certainly, under the conditions here shown, it was his duty to look. Charged with this

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notice, if he then deliberately drove into a place of danger, he cannot recover. The judgment is affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15745. Department Two. August 6, 1920.]

AMERICAN SAVINGS BANK & TRUST COMPANY *et al.*,
Respondents, v. LENA GERTRUDE CLOSKY PETERSON,
Executrix etc., Appellant.¹

MORTGAGES (32)—VALIDITY—MENTAL CAPACITY—EVIDENCE—SUFFICIENCY. In an action to foreclose a mortgage, a finding of mental capacity to execute the note and mortgage is sustained where it appears that the maker was competent to manage his affairs, although there may have been some impairment of mentality as compared to times when the maker was at his best.

SAME (144)—FORECLOSURE—DEFENSES—WANT OF OR FAILURE OF CONSIDERATION—EVIDENCE—SUFFICIENCY. In an action to foreclose a mortgage given as security for stock purchased in a trust company, want or failure of consideration are not shown from the fact that the concern was in an unprosperous condition, where no representations were made as to the value of the stock, and the purchaser, who was vice president of the concern, had knowledge of the conditions and believed that care and skill would restore its prosperity, and that the stock would prove a profitable investment.

Appeal from a judgment of the superior court for Okanogan county, Neal, J., entered July 14, 1919, in favor of the plaintiffs, in an action to foreclose a mortgage, tried to the court. Affirmed.

Kerr & McCord and *Johnson* and *O'Conner* (Wm. Z. Kerr, of counsel), for appellant.

J. Henry Smith, *P. D. Smith*, and *W. C. Brown*, for respondents.

TOLMAN, J.—This action was brought by respondents, as plaintiffs, to foreclose a mortgage upon cer-

¹Reported in 191 Pac. 837.

tain real estate in Okanogan county, given by M. W. Peterson, since deceased, to secure the payment of a note for \$25,000, and interest, dated September 13, 1916. From a decree of foreclosure, this appeal is prosecuted.

It appears that, on August 10, 1915, one Phillips entered into a contract with respondent Murray to purchase from him 1,519 shares of the capital stock of the Bankers Trust Company of Tacoma (being a majority of the stock of that company), at the agreed price of \$150,000. The stock being placed in escrow with the respondent American Savings Bank & Trust Company of Seattle, and prior to the entry of Peterson into the transaction, \$50,000 had been paid on this contract, and the remaining \$100,000 and accrued interest was due. Peterson, who had been a lifelong banker of excellent reputation and standing, theretofore holding important positions with banks in Seattle and Portland, became connected with the Bankers Trust Company as vice president about a month before he executed the note and mortgage, and assumed an active part in the management of its affairs, and had ample opportunity to ascertain its condition. Under these circumstances, he entered into an agreement with Phillips to take over the contract of purchase of the stock from Murray for the amount then due Murray, plus \$25,000, or \$25,000 less than Phillips agreed to pay for the stock, and the note and mortgage in suit were executed by Peterson at the place of business of the American Savings Bank & Trust Company, to the order of Phillips, representing the payment to him, and were immediately assigned by Phillips to the respondents, first, as collateral security for a note for \$10,000 owing by Phillips to the American Savings Bank & Trust Company, and second, as collateral

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security on the Murray contract; the time for the payment of the remaining amount then due on the Murray contract being thereupon, in consideration of the giving of such collateral, extended for one year.

Thereafter both Phillips and Peterson appear to have been interested in providing funds to pay the balance still owing Murray. Phillips appears to have gone east, holding out the expectation that he would procure eastern capital to take up the stock, in which, however, he did not succeed. Peterson hoped to enlist a bank in Portland with which he had formerly been connected, but was disappointed, and thereafter at one time seems to have thought that he could effect such improvement in the affairs of the bank as to enable him to interest Tacoma capital, and later he appears to have placed his reliance upon obtaining the money from a mining venture in British Columbia in which he was interested, but which proved a failure.

The affairs of the Bankers Trust Company appear to have lacked something of being in a prosperous condition when Peterson made the purchase, and for some months under his management there was little if any change either way. Early in the year 1917, bank failures occurred in Seattle, and as a consequence deposits were withdrawn from the Bankers Trust Company, its condition became critical, the Clearing House Association had to come to its assistance, and Peterson was forced out of the management. Still later it was taken over by, and consolidated with, the Scandinavian American Bank of Tacoma. The record shows that its assets were no more than sufficient to cover its liabilities and pay to the stockholders perhaps two or three per cent on the par value of their stock.

Before the year's extension expired, Peterson died testate, his will was admitted to probate, appellant was

appointed executrix, and failing to pay either the amount due the respondent Murray or the interest on the mortgage note when it became due on September 13, 1917, Murray obtained a judgment against Phillips, sold the stock on execution, himself becoming the purchaser, and because of the failure to pay the annual interest, under an option contained in the note, the whole amount of the mortgage note was declared due. A claim for such amount was filed with the executrix, and upon her failure to act thereon, this action was commenced.

The defenses pleaded and urged below were: (1) Want of consideration. (2) Fraud, undue influence, and want of mental capacity on the part of Peterson to execute the note and mortgage. (3) Failure of consideration.

In addition to these questions, it is urged here for the first time that the note is nonnegotiable, and therefore subject to defenses as though held by the original payee, and that a claim for the amount due was presented to the executrix, rejected by her, no suit was brought thereon within the time fixed by the probate code, and that therefore the note, as a negotiable instrument, is no longer of any effect; that the right to proceed under the mortgage alone remains, and that the rules incident to negotiable paper can no longer apply. We do not think either point well taken. The note is in the usual form, and when read as a whole presents nothing which would bar its negotiability. The record is silent as to any rejection, or notice of rejection, of the claim by the executrix as required by § 109, ch. 156, Laws of 1917, and in any event, the view we take of the evidence renders this point immaterial.

We have read with great care the conflicting evidence as to the mental condition of Peterson at, before

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and after the time of the execution of the note and mortgage, and while his mentality might have been somewhat impaired at the time he entered into the obligation, as compared with what it had been when he was at his best, we are satisfied that he was then competent to do business and manage his affairs. The evidence as to incompetency, as we view it, is tinged with the very human element sometimes called "hind-sight," and in view of the fact that afterwards, when the progress of the disease was such that he broke down physically, he also broke down mentally, it is easy to see how honest men, looking back to incidents regarding which, as they affected Peterson, they might not have been fully informed, may have honestly concluded that he was then so far mentally affected as to be incompetent to manage his affairs.

As to the defenses of want of consideration and failure of consideration, we cannot find that the proof sustains either. Peterson, a successful banker of life-long experience, was without occupation, and looking about for an opening, he went to the Tacoma bank as vice president a month before he purchased. He had every opportunity to learn the bank's condition for himself, and so far as the record shows, no one, then, or at any time, made any representations to him whatever regarding the value of what he afterwards bought. He may, with reasonable accuracy, have discovered the true condition of the bank at that time, and yet have believed that care and skill would quickly restore its prosperity, and that, as a going concern, the stock was worth much more than its book value and would prove a profitable investment on the terms offered. That he had insufficient capital to handle the matter alone and must interest others to take over the obligation, in whole or in part, within the year before

the main portion of the purchase price became due, would not necessarily cause a capable man of affairs to hesitate. Fortunes are often made by taking such chances, and could he have sold at par within the year, he would have gained a clear profit of \$25,000, or an even one hundred per cent on the amount which he hazarded. We are satisfied that, under the evidence, fairly and dispassionately considered, the result reached by the trial court was right. The judgment is affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15873. Department Two. August 6, 1920.]

NATIONAL BANK OF COMMERCE OF SEATTLE, *Appellant*,
v. A. L. B. DAVIES *et al.*, *Respondents*.¹

TAXATION (154-1)—FORECLOSURE SALE—PUBLICATION OF NOTICE—DESCRIPTION OF PROPERTY. A published notice of tax sale of the east half of a quarter section of land, describing the property as a quarter section and the number of acres to be sold, and referring to the tax number used in the assessor's tract book as provided by Rem. Code, § 9113, is sufficient, since the description, though incomplete, was supplied by the use of the tax number, which directed attention to the particular property of which he owned one-half the area described.

SAME (187)—TAX DEED—EXECUTION. A tax deed is not prematurely executed although dated as of the last day for redemption, where it was not acknowledged or delivered until the next day.

SAME (141)—VACATION OF SALE—INADEQUACY OF PRICE. Mere inadequacy of price is not ground for setting aside a tax sale.

Appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered April 14, 1920, upon sustaining a demurrer to the complaint, dismissing an action to cancel a tax deed. Affirmed.

¹Reported in 191 Pac. 879.

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Opinion Per *TOLMAN, J.**Kerr & McCord and C. R. Hovey*, for appellant.*E. E. Wager*, for respondents.

TOLMAN, J.—In 1916 and prior thereto, the appellant was the owner of a tract of twenty acres of land in Kittitas county, Washington, described as the east half of the northeast quarter of the northwest quarter of section 29, township 18 north, range 19 east, W. M., which land was within the limits of a duly organized irrigation district known as the "Kittitas Reclamation District." Prior to 1916, the district attempted to levy a tax on this property, describing it on the tax rolls as: "NE $\frac{1}{4}$ NW $\frac{1}{4}$ Tax No. 5, Sec. 29, Tp. 18, Rg. 19, 20 Acres." The land was not described by metes and bounds, but was described in the assessor's tract book as "Tax No. 5, E $\frac{1}{2}$ NE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 29, Tp. 18, Rg. 19, Acres 20." The tax was not paid before delinquency, and a notice of tax sale was published which gave the name of appellant as owner, described the property as it appeared on the tax rolls, and which was printed in a newspaper published at Cle Elum within the county, but without the district and twenty-four miles distant from the county seat, there being several newspapers of general circulation published at the county seat. Pursuant to such published notice, the treasurer of Kittitas county proceeded, at the time fixed for such sale, as shown by the recitals in the deeds afterwards issued, as follows:

"And whereas, the treasurer and collector afore-said attended at the time and place fixed for sale, and proceeded with said sale, and the assessments upon the land hereinafter described not having been paid, and no owner or possessor of any of the lands hereinafter described having designated what portion thereof he wished sold for the assessments against any of the

same, I proceeded to offer the same for sale designating the least quantity of and the least portion of interest in the land that would be sold for the assessments and percentage which were by law a lien upon it, to wit: I offered for sale at public auction, separately, each lot, parcel or tract of land as hereinbelow described, and at said auction, and upon said offers of sale, A. L. B. Davies, the party of the second part hereto, was the bidder who was willing to take the least quantity of, or smallest portion of interest in each of said hereinbelow described lots, parcels and tracts of land, and pay the assessments and charges due on each of the same, and his was the highest and best bid for each of said lots, parcels and tracts, and each of said lots, parcels or tracts of land was separately struck off and sold by me to the said A. L. B. Davies, upon his separate bid for each and every lot, tract or parcel as it was aforesaid, and he paid the full amount of the assessment and charges due upon each of said lots, parcels or tracts of land and became the purchaser thereof; and in the three columns next following are contained, first the names of the persons assessed as the owners of said lots, parcels and tracts, second, the particular description of each lot, parcel or tract of land sold, as aforesaid set opposite the name in which it was assessed; and third the amount for which said lot, parcel or tract of land was sold set opposite its description, the said three columns being marked at the top respectively, 'Names of persons assessed' under which appears the names aforesaid and 'Description of land sold' under which appears the description aforesaid, and 'Amount sold for' under which appears the amounts aforesaid, to wit:

Names of persons Assessed	Description of Land sold	Am't sold for
National Bank of Commerce	Sec. 29 Tp. 18 Rg. 19 NE $\frac{1}{4}$ NW $\frac{1}{4}$ Tax No. 5, 20 Acres	\$2.20

All of said lots, parcels and tracts of land situate, lying and being in Kittitas Reclamation Irrigation District, in the County of Kittitas, in the State of Washington."

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The granting clause of the deed being:

“I, **W. G. Damerow**, treasurer and collector aforesaid, by virtue of and in pursuance of the statutes in such cases made and provided, have granted, sold and conveyed, and by these presents do grant, sell and convey unto aforesaid **A. L. B. Davies** and to his heirs and assigns forever, all and every of the lots, parcels and tracts of land as aforesaid and hereinbefore described in this deed, as fully and absolutely as I, **W. G. Damerow**, treasurer and collector as aforesaid, may or can lawfully sell and convey the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining to each of said lots, parcels or tracts of land.”

This deed was dated February 24, 1919, and acknowledged February 25, 1919, and was filed with the clerk on the last named day, and afterwards recorded. Appellant, by its second amended complaint, sets up these facts, alleges a subsequent tender of all sums paid as taxes by the purchaser, with interest; that the land is reasonably worth \$1,500; that the amounts, with interest, paid by the purchaser aggregate less than \$100, and prays for a decree cancelling the deed. To this complaint a demurrer was sustained, and appellant electing to stand on its complaint, a judgment of dismissal followed, from which it appeals.

No point is made in the briefs or the oral argument based upon the publication of the delinquency list or notice of sale in a paper published outside of the irrigation district and not at the county seat, and as the publication appears to be substantially as required by Rem. Code, § 6440, we pass that question without further comment.

It is strenuously argued that there is no authority in law for the description of this property as it was described in the tax rolls and in the published notice. It will be seen that the description “NE $\frac{1}{4}$ NW $\frac{1}{4}$ Tax

No. 5, Sec. 29, Tp. 18, Rg. 19, 20 acres," as compared with the east half of the northeast quarter of the northwest quarter of section 29, leaves something to be desired, unless "Tax No. 5" supplies the deficiency and directs attention to this particular property. The statute with reference to this subject, Rem. Code, § 9113, so far as here applicable, reads:

"The assessor shall list all real property according to the largest legal subdivision as near as practicable. The assessor shall make out in the plat and description book in numerical order a complete list of all lands or lots subject to taxation, showing the names and owners, if to him known, and if unknown, so stated; the number of acres and lots or part of lots included in each description of property and the value per acre or lot: Provided, that the assessor shall give to each tract of land where described by metes and bounds a number, to be designated as Tax No. — which said number shall be placed on the tax rolls to indicate that certain piece of real estate bearing such number, and described by metes and bounds in the plat and description book herein mentioned, and it shall not be necessary to enter a description by metes and bounds on the tax-roll of the county, and the assessor's plat and description book shall be kept as a part of the tax collector's records:"

It is true that the statute directs the adoption of a tax number for each tract described by metes and bounds, and we may assume for present purposes that the assessor is not authorized to go beyond the plain letter of the law, yet the assessor's tract book is made a part of the tax collector's record by the statute, and by the use of the words "Tax No. 5," one whose attention was called to an incomplete description within which he owned half the area described, and the notice advised him that one-half the tract was to be sold, and that he was the owner of the property affected, could hardly be heard to say that he did not have notice.

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The law, in providing for this kind of notice, assumes conclusively that, by the lawful publication, the owner will see and take notice, so in effect we have the same question here as though the record showed that the owner read the published notice. Many cases have been decided by this court upon the sufficiency of the description contained in such a notice. Appellant relies upon *Miller & Sons v. Daniels*, 47 Wash. 411, 92 Pac. 268, where the tax deed described the property as twenty-five acres in a certain section (this court very properly held that, if the deed described the particular twenty-five acres in question, then it likewise described any other twenty-five acres in the same section); *Welch v. Beacon Place Company*, 48 Wash. 449, 93 Pac. 923, where the description of a lot in Syndicate Addition, without giving the name of any city or town, in a county where were several Syndicate Additions, was held insufficient; *Wick v. Rea*, 54 Wash. 424, 103 Pac. 462, where the tract in question was entirely omitted from the published notice; *Kennedy v. Anderson*, 88 Wash. 457, 153 Pac. 319, where there was no such tract in existence as that described, and the purchaser claimed a tract wholly outside the description because the treasurer pointed out such tract at the time of the sale; *Moller v. Graham*, 101 Wash. 283, 172 Pac. 226, where the property was described in the summons as being in Bowman's Plat, and on the tax roll as being in Bowman's Central Ship Harbor Water Front Plat. Clearly none of these are of assistance here. More nearly in point, however, is *Stanchfield v. Blessing*, 55 Wash. 620, 104 Pac. 800, where the description of the northeast quarter of the southwest quarter was published as the northeast quarter or the southwest quarter, followed by "forty acres" (this was held sufficient); *Old Republic Mining Co. v. Ferry County*,

69 Wash. 600, 125 Pac. 1018, where the description "Cecelia Lode" was held a sufficient description of the Cecelia Fraction; *Northern Pac. R. Co. v. Smith*, 68 Wash. 269, 122 Pac. 1057, where the description "Township 10 West" instead of "Township 10 North" was held to be a mere clerical error. We conclude that the notice as published was sufficient.

The contention that the deed was prematurely executed cannot be sustained. While dated February 24, which was the last day for redemption, it was not acknowledged or delivered until February 25.

We have so often held that mere inadequacy of price is not sufficient to justify the setting aside of a tax sale that there is no occasion to again discuss the subject. *Rothchild Bros. v. Rollinger*, 32 Wash. 307, 73 Pac. 367; *J. K. Lumber Co. v. Ash*, 104 Wash. 388, 176 Pac. 550.

The judgment of the trial court is affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15896. Department Two. August 6, 1920.]

BOSTON & SPOKANE REALTY COMPANY, *Appellant*, v.
FRANC INVESTMENT COMPANY, *Respondent*.¹

MORTGAGES (223)—FORECLOSURE—RENTS AND PROFITS—PARTIES ENTITLED. A senior mortgagee, bidding in the property at its own foreclosure sale for the full amount due, is not entitled to rents and profits prior to the time its right of possession accrued, and has no interest in rents collected by a receiver appointed in a prior foreclosure suit by a junior mortgagee who was entitled to collect rents and apply the same to taxes, interest and a deficiency judgment to which the senior mortgagee was not party; and hence cannot have the receiver's appointment vacated on the ground that it was without notice.

Appeal from an order of the superior court for Spokane county, Webster, J., entered February 3, 1920, distributing funds in the hands of a receiver appointed in an action to foreclose a mortgage, after a hearing before the court. Reversed.

Danson, Williams & Danson (R. E. Lowe, of counsel), for appellant.

Charles P. Lund, for respondent.

TOLMAN, J.—The appellant, Boston & Spokane Realty Company, commenced this action against Arthur A. Dunphy and others for the foreclosure of a second mortgage made by Dunphy and wife. Respondent, the holder of the first mortgage, was not made a party to the action.

In its complaint appellant alleged, among other things, that, at the time its mortgage was executed, the mortgagors, by a separate writing, agreed that appellant should be placed in possession of the mortgaged property, should collect the rents and disburse

¹Reported in 191 Pac. 826.

them: (1) In payment of agent's commission. (2) In payment of taxes, assessments, insurance, and operating and maintenance charges. And (3) any sum remaining to be applied, first to the payment of interest, and second, to the payment of the principal of any mortgages which might be a lien against the property. It is further alleged that, notwithstanding such written agreement, the mortgagors had regained possession of the property and were collecting the rents and applying them to their own use, and the prayer was for the appointment of a receiver, as well as the usual prayer for foreclosure. After the filing of the complaint, a hearing was had and a receiver appointed, who, during the pendency of the action and before the sale on foreclosure, collected the fund now in dispute. On November 1, 1919, appellant bid in the property at sheriff's sale, leaving a deficiency unsatisfied upon its judgment against the mortgagors of \$717.79. Thereafter the receiver made his report of receipts and disbursements, which was approved, his fees were fixed and allowed, and he was directed to pay over the balance in his hands to appellant to apply on its deficiency judgment.

Thereafter the respondent filed its petition in the action, in which it alleged that it was the holder of a first mortgage on the property, made by the predecessors in interest of the defendants Dunphy and wife; that it began an action to foreclose thereon on April 17, 1919; that then, and at all times since, the owners of the legal title had failed to pay certain taxes and special assessments thereon which were a first lien; that appellant began its action to foreclose a junior mortgage on June 3, 1919, and procured the appointment of a receiver to collect the rents "and apply the rents as shall be directed by the court, and to the pay-

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ment of taxes, assessments, interest and mortgage indebtedness on the several pieces of real estate, from the rent received from such real estate, as the court shall direct." The petition further set forth the substance of the receiver's report and the order made thereon; alleged that petitioner had no notice of the hearing on said report, and prayed that the order be set aside and the receiver be directed to apply the money in his hands toward the payment of taxes and assessments on the mortgaged property. The petition does not allege, but it is admitted here, that, prior to the making of the order therein complained of, and prior to the filing of the petition, respondent, at its own foreclosure sale, had purchased the mortgaged property for the full amount due to it under its decree and its judgment was wholly satisfied. Appellant demurred to the petition, and upon a hearing the trial court vacated the prior order and directed the funds in the hands of the receiver to be paid towards the satisfaction of the taxes and assessments on the mortgaged property. This appeal followed.

It is apparent that appellant, by reason of the written agreement giving it possession and the right to collect and apply the rents, was in a more advantageous position than an ordinary mortgagee, and had that agreement been respected, it would have been a mortgagee in possession and, as against respondent (it not being contended that such agreement was made for respondent's benefit), it could have held possession and collected the rents up to the day when by virtue of its purchase at sheriff's sale respondent became entitled to possession, and would have been accountable then, not to respondent, but only to its mortgagor or his successor in interest. This being so, how can it be contended that respondent has any right to, or interest

in, the rents which accrued and were paid before it had any right to the possession or rents? The terms of the written agreement having been violated, appellant sought, as it had a right to do, the aid of a court of equity, through its receiver, to secure merely what the agreement gave it, and that only. The receiver in such a case is a special one for a special purpose, and his duties are circumscribed by the issues in the case in which he is appointed. Nor is he subject to control, directly or indirectly, by one not a party to the cause, hence the respondent, having no interest in the fund in the receiver's hands and no control over the receiver's acts, was not entitled to notice of the filing of the receiver's report and had no interest in, and was not bound by, the order made thereon.

Moreover, respondent, at its own foreclosure sale, knowing, as it was bound to do from the public records, that the taxes and assessments were unpaid and a first lien upon the land, saw fit to purchase the property, subject to such taxes and assessments, for the full amount of its judgment, which judgment apparently was not against Dunphy and wife, but was against previous owners only, and thus satisfied that judgment in full and has no further claim against any one. So far as appears, and under the usual form of mortgage in use in this state, if respondent's mortgagees covenanted to pay taxes and assessments, their breach of that covenant might entitle the mortgagee to declare the debt due, or to pay the taxes and add the amount to the mortgage debt, or both, but except under unusual conditions, not here shown to have been alleged or proven in its action to foreclose, it could not reach out and seize the rents prior to the time when its right to possession accrued.

The judgment of the trial court is reversed, with

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directions to reinstate the order attacked by respondent's petition.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15867. Department Two. August 9, 1920.]

FRANK MARTON *et al.*, Respondents, v. W. B. PICKRELL
et al., Appellants.¹

HIGHWAYS (53)—LAW OF THE ROAD—APPLICATION. The statutes requiring travelers to keep to the right upon a public highway have reference to vehicles, and do not refer, in express terms or by necessary implication, to pedestrians; nor do they require the user to keep to the right in traveling, but cover only the meeting and passing of traffic.

HIGHWAYS (53, 58)—COLLISION—INJURY TO PEDESTRIAN—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether defendant used necessary care to avoid an accident and whether plaintiff was guilty of contributory negligence, are questions for the jury, where plaintiff, walking upon the left-hand side of a paved highway after dark, stepped toward the center of the road upon seeing defendant's car approaching, and continued to do so upon seeing that the car also turned toward the center of the road, and he was struck when he had reached a point midway between the center and the right-hand edge of the pavement.

APPEAL (433)—REVIEW—HARMLESS ERROR—FAVORABLE TO APPELLANT. Appellant cannot complain of a conflict between an instruction applying the rule of the road to a pedestrian on the left side of the road and one placing upon him the burden of proving the contributory negligence of the pedestrian, since the first instruction was erroneous and favorable to appellant.

APPEAL (460)—REVIEW—HARMLESS ERROR—INSTRUCTIONS—PREJUDICIAL EFFECT. Error cannot be predicated upon instructions relating to the evidence of plaintiff's admission of fault and contributory negligence and as to plaintiff's knowledge of the law, where the evidence at most amounted to a conclusion and not a fact, and the jury could not have been misled by the reference to his knowledge of the law.

¹Reported in 191 Pac. 1101.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 1, 1919, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a pedestrian struck by an automobile. Affirmed.

Lee & Kimball, for appellants.

John L. Dirks, for respondents.

TOLMAN, J.—A public highway, with a paved roadway twenty feet wide, known as the Apple Way, runs east from the city of Spokane and is extensively traveled, during the usual hours, both by vehicles and pedestrians. About 6 o'clock in the evening of January 23, 1919, respondent, with a companion, was walking eastward along this highway towards his home at Opportunity, and at that time of the year it was then quite dark. For a time they traveled along the right side or southerly edge of the pavement, but at that hour the travel was mostly from Spokane towards the east, and many automobiles approached and passed them from behind, while but few machines were traveling in the opposite direction. Observing this condition, respondent and his companion passed to the north or left side of the paved roadway and pursued their course along the northerly side of the pavement, the companion walking near the edge and respondent beside him, some three feet from the edge of the pavement.

While so proceeding, they observed the headlights of appellant's automobile approaching from the east, when, as they estimate the distance, it was about ninety feet from them, and appellant testified that he saw them clearly in the light of an automobile coming from the west when they were about one hundred and twenty-five feet from him. Upon seeing the approach-

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ing car, respondent's companion stepped off the pavement to the north, while respondent stepped to the south toward the center of the roadway, intending, as they had done immediately before when meeting another automobile, to let appellant's car pass between them. As respondent stepped toward the center of the roadway, he continually watched the approaching headlights, and observed that appellant's car also turned toward the center of the roadway as it approached. He then took two quick jumps, as he expresses it, toward the south, to avoid the approaching car, but it also turned still more in the same direction, and he was struck by the right front end of the machine, the collision occurring at a point about midway between the center and south edge of the pavement, and respondent receiving the injuries complained of. From a verdict and judgment against him, appellant brings the case here on appeal.

A challenge to the sufficiency of the evidence was interposed at the close of plaintiff's case and overruled, and at the close of the entire case, the motion was renewed and again denied. The same question was raised by a motion for judgment *non obstante verdicto*.

Appellant bases his argument in support of this point upon the assumption that respondent was *prima facie* guilty of negligence in being upon the left side of the paved roadway. In this we think he overlooks the fact that our statutes, generally referred to as "the law of travel" and "the rule of the road," have reference to vehicles and those riding or driving animals upon a public highway, and nowhere in express terms, or by necessary implication, we think, do they refer to pedestrians. It is a matter of common knowledge that a pedestrian on a highway, or on a double track

line of railway, is far better able to look out for his own safety and protection by so traveling as to face all oncoming vehicles, than he would be if keeping to the same side of the roadway as vehicular traffic, and being thus at all times obliged to keep watch to the rear. Nor does the statute require any user of the highway to keep to the right in traveling, but covers only the meeting and passing of traffic. At any rate, in the absence of a clear statutory rule applying to pedestrians, the question is one for the jury. Under the facts shown by the record, it was for the jury to say whether or not appellant used the necessary degree of care to avoid the accident, and whether or not respondent was guilty of contributory negligence.

What has just been said clearly indicates that, if there was a seeming conflict between the instruction which applied the rule of the road to pedestrians and the instruction which placed the burden of proving contributory negligence upon the defendant, upon the giving of which error is assigned, the latter instruction was clearly right and the appellant has no cause to complain of the former.

An instruction was given which advised the jury, in effect, that, if the plaintiff had made any admissions indicating that the collision was due to his own fault, such admissions must be considered in the light of all the circumstances surrounding him when made, and would be binding upon him only in case he was then fully advised as to all of the facts and as to the law applicable thereto. The evidence which called forth this instruction was introduced by appellant and denied by respondent, and as we read it, the statements, if made, and if admissible at all, amounted to no more than an expression of opinion that both parties were to blame, or, in one instance, that it was his own fault,

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in either case a conclusion and not a fact, and as such not apt to be very convincing with a jury, and easily susceptible of excuse or explanation. We have no doubt, since the evidence was before the jury, that the instruction was a proper one in all except the reference to knowledge of the law applicable thereto, but since it is a common adage, known and repeated everywhere, that every man is presumed to know the law, we cannot, in the absence of anything in the record to so indicate, hold that the jury was misled thereby.

An additional error is assigned, but not argued, relating to still another instruction. We have examined the instruction referred to and are unable, unaided, to find anything therein approaching reversible error.

The judgment of the trial court is affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15893. Department Two. August 9, 1920.]

MARGARET SMITH DAVIS *et al.*, *Appellants*, v.

MRS. ABNER BROWN *et al.*, *Respondents*.¹

WILLS (74) — CONSTRUCTION OF POWERS — "DEBTS" — PAYMENT. Under a will requiring payment of the testator's debts within six months, in which the testator showed special concern as to bequests of income "for a period of fifteen years from and after my death," a mortgage indebtedness of \$80,000 upon the real estate was not a "debt" to be paid from income, or within six months, where it did not mature until long after that period and had not been assumed so as to be a personal liability, and the income was much too small to pay it off within six months.

Appeal from a judgment of the superior court for King county, Hall, J., entered April 24, 1920, in favor of the defendants, in an action to construe a will, tried to the court. Affirmed.

¹Reported in 191 Pac. 1098.

Weter & Roberts, for appellants.

Edgar L. Crider, for respondents.

TOLMAN, J.—Appellants, plaintiffs below, as executors and trustees under the will of John Davis, deceased, brought this action for the purpose of obtaining a construction of the will and directions as to their duties thereunder, making all persons interested parties defendant.

The facts, which are not in dispute, are as follows: John Davis died in King county in November, 1917, leaving a last will and testament, which was admitted to probate by the superior court for King county on December 6 following. The will reads:

“In the Name of God, Amen:

“I, John Davis, of the city of Seattle, state of Washington, being over the age of twenty-one years, and of sound mind, do hereby make, publish and declare this my last will and testament, hereby revoking all former wills heretofore by me at any time made.

“First. I hereby declare that my wife, Margaret Smith Davis, and I have entered into a written agreement, and have executed, acknowledged and delivered conveyances each to the other, whereby all property, real, mixed and personal, now standing in my name, and all which may hereinafter stand in my name, together with all income, rents, issues and profits therefrom, is and shall be my sole and separate property, and all property, real, mixed and personal now standing in the name of my wife, Margaret Smith Davis, and all which may hereafter stand in her name, together with all income, rents, issues and profits therefrom, is and shall be her sole and separate property.

“Second: To my wife, Margaret Smith Davis, I give and devise an undivided one-half interest to the forty-acre tract in section twenty-five (25) township twenty-six (26) north range three (3) east, which forty-acre tract was owned by my wife’s father and myself as tenants in common.

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"I also give and bequeath to my wife all household furniture, pictures, silverware and housefurnishings of every character and description whatsoever, for her sole and separate use and benefit, absolutely and forever.

"Third: For a period of fifteen (15) years from and after my death I give, devise and bequeath the income from all of the rest, residue and remainder of the property now owned by me, and all which I may at any time hereafter acquire, to my trustees herein-after named, and their successors in trust, for the following uses and purposes, and for the benefit of the following named persons:

"(1) In trust to receive such income and to pay therefrom the sum of one hundred dollars (\$100) per month to my mother, Mary Ryan, of Oakland, California, during the full term of her natural life;

"(2) From the monthly income remaining after the monthly payment to my mother of one hundred dollars, I will and direct my trustees to pay to Mrs. Blanche Smith and to Miss Marjorie Thomas, both of Seattle, monthly, the sum of fifty dollars (\$50) each, for the period of ten years from and after my death;

"(3) The income remaining after the payments hereinbefore mentioned shall be equally divided between my son John Davis, Junior, and my sisters, Mrs. Abner Brown of Seattle, and Mrs. Jennie Quiner of Richland, Washington, and upon the expiration of such ten years, the income from my estate, after paying to my mother the monthly sum of one hundred dollars, as hereinbefore provided, shall be equally divided between and paid monthly to my son John Davis, Junior, and my two sisters hereinbefore named, and their survivors or survivor, until the expiration of fifteen years from my death, at which time the principal and income of my estate, subject to the monthly payment of one hundred dollars to my mother, if she be then living, shall be equally divided between and paid over to my son John Davis, Junior, and my two sisters hereinbefore named; and in case of the death of either my son or my two sisters prior to such time, my trustees shall divide equally between and pay over to the survivors

or survivor of my son and my two sisters hereinbefore named, the principal of such estate upon the expiration of such time.

“Fourth: Subject to the foregoing provisions, I give, devise and bequeath the rest, residue and remainder of my estate to my trustees hereinafter named, and their successors in trust, to hold and conserve the principal of my estate for the use and benefit of my son John Davis, Junior, and my two sisters, Mrs. Abner Brown and Mrs. Jennie Quiner, for the period of fifteen years from my death, and upon the expiration of such period to divide, and pay over and deliver to my son and my two sisters, or to the survivor or survivors of the three, the principal of my estate, absolutely and forever, it being my intention that in case of the death of any one of the three prior to the expiration of such fifteen years, such principal shall be divided between the survivors or survivor of them who shall be living at the expiration of such period, and that no descendent of either one of the three shall be entitled, under this will, to the share of the parent.

“Fifth: I hereby appoint as trustees under this will, my wife, Margaret Smith Davis, Abner Brown, William E. Best, Langdon C. Henry and James B. Howe, all of Seattle, giving and granting unto a majority of such trustees, and their successors, the right and authority, by an instrument in writing signed by such majority and filed in the office of the clerk of the superior court of the state of Washington for King county, to appoint a successor to any one of the trustees herein named who shall not qualify, or who, qualifying, shall thereafter resign or die.

“Sixth: I also authorize and empower my wife, Margaret Smith Davis, with the consent of three of the other trustees, to sell and dispose of any portion of the principal of my estate, upon such terms and conditions and for such price as she and such three trustees may deem advisable, and without obtaining authority from any court or judge so to do, and in such case the purchaser, after paying the purchase price,

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shall not be bound to see to the application of the proceeds of such sale.

“Seventh: I appoint my wife, Margaret Smith Davis, guardian of the person and estate of my son John Davis, Junior.

“Eighth: I hereby nominate, constitute and appoint my wife, Margaret Smith Davis, executrix, and Abner Brown, William E. Best, Langdon C. Henry and James B. Howe, executors, of this my last will and testament. In case any one or more of them shall not qualify, or, if after qualifying, shall die or resign, those qualifying or surviving, as the case may be, shall have all the powers which all of them would have had if all had qualified, and shall settle my estate and deliver the same to my trustees hereinbefore named. I will and direct that my estate be settled in the manner provided in this my last will and testament; that no bond or bonds shall be required of my trustees or any of them, or any successor of any one of them, nor shall any bond or bonds be required of my executrix or of my executors, or either of them; that neither letters testamentary nor of administration shall be required of my executrix or of my executors, or either of them, and it shall not be necessary for them or either of them to take out letters testamentary or of administration, but they shall have this my last will and testament duly probated and shall file a true inventory of all of my property in the manner required by existing laws, and after the probate of this will and the filing of such inventory, and the obtaining of a decree of solvency, my estate shall be managed by my said executrix and executors until my debts be paid, if any shall exist at the time of my death, and upon such payment, or upon the expiration of the time for the presentation of claims against my estate, my executrix and executors shall deliver my estate to my trustees hereinbefore named and until the time of such delivery my executrix and executors shall settle my estate without the intervention of any court, and thereafter my trustees shall settle my estate in the manner hereinbefore provided for, and without the intervention of any court or courts.

"In witness whereof, I have hereunto set my hand and seal to this my last will and testament, this tenth day of November, A. D. One Thousand Nine Hundred and Seventeen."

Under this will there passed into the possession of appellants, as executors, an estate consisting of personal property valued at \$169,309.19, and real estate valued at \$188,285. The total indebtedness of the estate, aside from the mortgages hereinafter referred to, amounted to not more than \$15,000, all of which was paid by appellants in due course of administration, and before they settled their accounts as executors and proceeded to handle the estate as trustees.

Among other real estate belonging to the estate is an undivided one-half interest in lots 2 and 3, block 22, of A. A. Denny's addition to Seattle, purchased by the testator in his lifetime, and then and now subject to mortgages aggregating \$160,000 on the whole, no part of which were assumed in the purchase. So that, while the testator was not personally liable for any part of the debts secured by these mortgages, and claims based thereon were not and could not have been proven as debts against his estate, yet the undivided one-half interest in the property now held by appellants as trustees is subject to such indebtedness in the principal sum of \$80,000, and may be taken in payment thereof by foreclosure, if default in payment be made, though the estate cannot be held for any deficiency.

Appellants, by their complaint, ask that the will be construed, and they be directed in the following particulars:

"(a) Can plaintiffs pay income of the estate to those named as beneficiaries of the income while there is mortgage indebtedness on the real estate?

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“(b) Can plaintiffs use any or all of the income of the estate in reducing and paying the mortgage indebtedness above described?

“(c) Is such mortgage indebtedness a ‘debt’ of the estate as described in paragraph ‘eighth’ of the will?

“(d) Can any of the income of the estate be used in placing improvements upon property of the estate in order to make same productive of an income?

“(e) Are those named as beneficiaries of the income entitled to the whole net income of the estate irrespective of the mortgage indebtedness above described?”

The decree of the trial court answered these questions by construing the will as follows:

“(1) That the entire income of the estate, less only running and management expenses thereof, and the specific bequests to Mary Ryan, Mrs. Blanche Smith, and Miss Marjorie Thomas, be paid to the defendants John Davis, Jr., Mrs. Abner Brown, and Mrs. Jennie Quiner, all as provided in the third paragraph of said will.

“(2) That no part of said income shall be used in reducing, paying off or discharging the mortgage indebtedness of the estate or any part thereof, except only to pay interest.

“(3) That no part of said income shall be used in placing permanent improvements upon any property of the estate.

“(4) That the payment, in whole or in part, of the principal of said mortgage indebtedness can only be made by the plaintiffs out of the capital of the estate or proceeds derived from the liquidation thereof.”

From which result, by appeal, the case is brought here for review.

In construing a will certain fundamental rules must be always borne in mind:

“The intention which controls in the construction of a will is that which is manifest, either expressly or by necessary implication, from the language of the will,

as viewed, in case of ambiguity, in the light of the situation of the testator and the circumstances surrounding him at the time it was executed, although technical words are not used; or, as is sometimes said, the testator's intention must be ascertained from the four corners of the will. Hence a will cannot be construed by a mere conjecture as to the intention of the testator; but it is the intention which the testator expresses in his will that controls and not that which he may have had in his mind, or which is manifested by some other paper not a part of the will, or by previous declarations." 40 Cyc. 1388.

"In determining the testator's intention the court should place itself as near as possible in his position, and hence, where the language of the will is ambiguous or doubtful, should take into consideration the situation of the testator and the facts and circumstances surrounding him at the time the will was executed, such as the fact that the will was written by the testator who was not a professional man, the condition of the family and the amount and character of his property, the state of the property devised, the testator's relation to the beneficiaries, and the mode of life in which his family has been reared and the means provided by him in his lifetime for their culture and happiness . . ." 40 Cyc. 1392.

These principles were early recognized in this state. *Newport v. Newport*, 5 Wash. 114, 31 Pac. 428.

So, taking this will by its four corners, the intention of the testator in some respects becomes self-evident. The opening clause of paragraph three, which disposes of the income, is: "For a period of fifteen years from and after my death—." It is generally held that, where a bequest is made of income, it is payable from the time of the testator's death. *Newport v. Newport*, *supra*; *Stahl v. Schwartz*, 81 Wash. 293, 142 Pac. 651; *Jesseph v. Westerberg*, 94 Wash. 602, 162 Pac. 1004; *Matter of Harden*, 177 App. Div. 831, 164 N. Y. Supp. 1014; *Lovering v. Minot*, 9 Cush. (Mass.) 151, and

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In re Jacoby's Estate, 204 Pa. 188, 53 Atl. 768. The testator here, although presumed to know the law, seems to have taken special pains to make his intention clear that the income should immediately pass, by adding the words "from and after my death." Moreover, the dominant note of the will shows clearly that the testator was especially concerned with the income of his estate, and took great pains to provide for its disposition with such exactness and in such detail that his intention cannot be doubted.

This being so, did he intend that the mortgage indebtedness should be regarded as indebtedness of his estate, in the full and unrestricted sense, and be paid in the course of administration as and with the general indebtedness? The will bears date but a few days before the testator's death, and it must be presumed, until the contrary clearly appears, that he had in mind the then condition of his affairs and, of course, knew of the existence of the mortgages. These were for large amounts not then due, had been carried by him since the purchase of the property with, so far as here appears, no effort to retire or reduce them, if, indeed, they could have been paid or reduced before maturity. And if he contemplated their payment within the six months allowed by law for the presentation of claims, it would seem that he would have made some specific reference to them or provision for their payment.

Again, as has been said, the testator is presumed to have known the law, and it seems unlikely that a man of his experience and business ability, who had long been engaged actively in the real estate business, could have failed to appreciate the fact that he did not owe these mortgage debts, had not, in fact, executed the notes or mortgages, did not assume them in the pur-

chase of the property, and though the property was subject to them, he and the remainder of his estate were immune from any liability thereon, or deficiency which might arise upon foreclosure. With this in mind, the language of the last paragraph of the will (the only language therein contained which refers to indebtedness of any kind) is significant:

“My estate shall be managed by my said executrix and executors until my debts be paid, if any shall exist at the time of my death, and upon such payment, or upon the expiration of the time for the presentation of claims against my estate, my executrix and executors shall deliver my estate to my trustees hereinbefore named.”

It is also significant that, though the testator knew that the time for the presentation of claims was but six months, and six months' income on an estate of this size, however well invested, could not begin to pay \$80,000 represented by the mortgages, yet he gave to the executors no power to sell real estate and no specific power to sell any property to pay debts.

Moreover, after having made careful disposition of the income of his estate in the three subdivisions of paragraph three of the will, it is provided in paragraph four, “subject to the foregoing provisions, I give, devise and bequeath all the rest, residue and remainder of my estate to my trustees hereinafter named, and their successors in trust, to hold and conserve the principal of my estate for the use and benefit,” etc., thus showing the dominant purpose of the testator was the disposition of the income, expressly subjecting the principal of his estate to that purpose and empowering and directing the trustees to conserve the principal, with the income already segregated by the direct reference to the preceding paragraph, from the body of the estate, and otherwise disposed of. The direction

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to conserve the principal under these conditions must mean the payment of the mortgages when they became due, if payment then be considered wise, by applying some part of the principal of the estate to that purpose, and, indeed, the personal estate seems ample to us, and probably seemed ample to the testator, for that purpose; especially so with the power to sell, which follows in the sixth paragraph of the will, thus enabling the trustees to dispose of such property, either real or personal, as in their judgment might best be sold. No doubt the testator considered his estate, without the income, abundantly sufficient to retire these mortgages, if that should be considered wise, and felt safe in applying the income to the support and comfort of those whom he considered entitled to his bounty.

The judgment of the trial court correctly construes the will, and is therefore affirmed.

HOLCOMB, C. J., MOUNT, and BRIDGES, JJ., concur.

[No. 15857. Department Two. August 9, 1920.]

HERMAN SORGE, JR., *Appellant*, v. IDA SORGE,
Respondent.¹

DIVORCE (104)—CUSTODY OF CHILD—MODIFICATION OF DECREE. The evidence supports a finding that the welfare of a young child will be promoted by modifying a decree of divorce so as to award its custody to the mother though she may have been guilty of past delinquencies, where it appears that she was conducting herself properly at the time and had married again and her husband was able and willing to provide for the maintenance of the child.

SAME. Where the mother was given custody of a minor daughter upon modifying a decree of divorce, and asked for no allowance from the father for its support, but testified that her present husband was amply able to provide for the child, the father should be relieved of monthly payments of ten dollars for its support.

¹Reported in 191 Pac. 817.

Appeal from a judgment of the superior court for King county, Tallman, J., entered October 28, 1919, in favor of the defendant, modifying a decree of divorce respecting the custody of a child, after a hearing before the court. Modified.

Albert D. Martin, for appellant.

Longfellow & Fitzpatrick, for respondent.

HOLCOMB, C. J.—In October, 1918, plaintiff, Herman Sorge, brought an action for divorce from his then wife, defendant, Ida Sorge (now Ida Brand), and asked that he be awarded the care and custody of their minor child, Pearl May Sorge. Plaintiff, in his complaint, charged the defendant with cruelty and improper conduct. The answer was a general denial of the allegations of the complaint and affirmatively charged plaintiff with drunkenness, cruelty and adultery. Defendant also prayed for the custody of the child. Issues were joined upon the pleadings, after which the parties entered into a stipulation whereby, for a consideration of \$250, defendant released certain property rights and did not appear in person at the trial of the cause. Upon hearing the evidence of plaintiff, the court made findings, and on November 22, 1918, entered a decree in favor of plaintiff, awarding him a divorce, with the custody of the minor child, then a little over three years of age. In July, 1919, defendant filed a petition for a modification of the decree which she alleged to have been procured by fraud, stating that she was frightened into not appearing to contest the divorce case; that it was not her intention or desire to waive custody of the minor child; that she was a fit and proper person to have the care and custody of the child, and that plaintiff was not; that the child's environments while in the custody of its father

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were not conducive to its proper bringing up; and that defendant had since her divorce been happily married to another man and was in a position to provide a good home for the child; whereupon plaintiff was cited to appear and show cause why the custody of the child should not be awarded to its mother. Plaintiff denied practically all the allegations of this petition, and upon these issues another trial was had. Upon this hearing, the court modified the original decree to the extent of awarding the child to the care of its mother, with the right of plaintiff to visit it at reasonable times. From this modification of the decree, plaintiff has appealed.

The evidence, as presented by the record, is flatly contradictory throughout. Respondent's testimony, which was supported by her witnesses, was to the effect that she was a fit and proper person to have the custody of the child; that her present husband is a man of good reputation, and able and willing to assist her in raising and caring for the child in a suitable manner. Her testimony and that of her witnesses assailed the character of the child's father in serious respects. The evidence adduced by appellant was of like character to that of respondent, to wit, that he was a fit and proper person to have the custody of the child; that he has a good home with his parents, who are willing to assist in the proper care of the child. At the same time, the character of respondent was affirmatively attacked and her unfitness for the custody of the child sought to be shown.

Appellant claims that the trial court erred in taking the minor child from his custody and awarding it to respondent and her present husband; and contends that the court, having awarded the child to appellant in the divorce case, must be presumed to have done so upon sufficient evidence and because the charges made

in the complaint were sustained. Appellant also suggests that it is significant of the truth of these charges that respondent married her present husband just as soon as permitted by law after the divorce from appellant. Appellant concedes the desirability of awarding young children to the mother, other considerations being the same, but contends that, when the woman shows no affection for the child when she has it, and neglects it for the society of men other than her husband, then her wishes should give way to the welfare and wishes of the child and its father; and it is contended that respondent should be required to wait at least long enough to prove her second marriage successful before having the decree modified, and that the welfare of the child was not taken into consideration.

Even if there were sufficient evidence to sustain the charges made in the original complaint, which we may assume for the sake of argument, there would still be no reason why changes for the better could not occur in the condition, habits or character of a parent who might formerly have been delinquent. Such parent might well, during the course of time, become in every way fit to have the custody of a child.

It is unquestionably true that the welfare of the child should be the foremost consideration, and that, in making the award of custody, the court must exercise a judicial discretion. It can hardly be seriously urged that the trial court departed from these rules of guidance in making its decree. The court, no doubt, realized that the welfare of the minor daughter and the moral conduct of respondent at the time of the petition for modification of the decree of divorce were determining factors, when he decided that respondent should have the custody of her minor daughter, and that past delinquencies, if any there were, should not

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bar her from having the child. Even if the conduct of a wife be immoral (but not grossly so)—and certainly that has not been shown to be true of respondent—her guilt may be overlooked if the child be of tender years; or it may be shown that the guilty party has repented, or that a recurrence of the improper conduct is not likely. Here the trial court found that there was no testimony to show that respondent was not conducting herself properly at the time of her petition for modification of the divorce decree, and that there were only insinuations to show that she had ever done anything very improper; that she may have been somewhat reckless in her manner, but that no criminal acts were shown. The court also said:

“From what I have said, it is unnecessary for me to say more than I have, except that I do not think he [appellant] is fit to have the care and custody of the child. The question is: Is she [respondent] a fit and proper person to have the care and custody of this child, and has she a proper place to take it. The evidence not only shows by a fair preponderance—not only shows beyond a reasonable doubt, but beyond all doubt, that for several months past she has lived an exemplary life, and the evidence also shows by the same fair preponderance that she has a good place to take it.”

As to the charge that respondent showed no affection for the child when she had it and neglected it for the society of men other than her husband, she denies that, and it is simply another part of the testimony as to which there is conflict.

Regarding the suggestion that respondent should be required to wait at least long enough to prove her second marriage successful before the decree is modified, we may say that such a situation at least suggests morality, and does not show unfitness to have the cus-

tody of her child. At any rate, the child is still within the jurisdiction of the court for future change of control, if the circumstances surrounding it so require.

Respondent's testimony being to the effect that her present husband is amply able to provide for the maintenance of the child, we can see no reason for requiring appellant, for the present, to pay the sum of ten dollars a month toward its support. Respondent asked no such relief in her petition for modification of the decree. To the extent of relieving appellant, for the present, of further payments toward the support of the child, the decree is modified.

It should be arranged by the trial court, under its decree, that appellant may visit the child, or take it, or have it taken, to his home at reasonable times, in order to avoid friction with respondent and her husband.

In all other respects the decree is affirmed. Neither party will recover costs.

BRIDGES, FULLERTON, MOUNT, and TOLMAN, JJ., concur.

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[No. 15854. Department One. August 9, 1920.]

F. L. HOWATT, *Doing Business as Sunset Tire Company, Appellant*, v. F. S. CLARK *et al.*, *Respondents*.¹

PLEADING (59-1)—ANSWER—MATTER AVAILABLE UNDER GENERAL DENIAL. In an action to recover the price of automobile tires, proof of an agreement between defendants and plaintiff's agent that the tires were to be left with defendants in storage for use of the trade in that part of the city was not the proving of an affirmative defense necessary to be pleaded as such, the only purpose being to show that the alleged sale contracts were never made.

SALES (6)—REQUISITES AND VALIDITY—PARTIES—PARTICIPATION AND RELATION. An implied contract of purchase of automobile tires does not arise from the fact that defendants, under an agreement with plaintiff's agent, allowed him to deliver and leave the tires in storage with them with the privilege of sale and right to commissions on sales made by the agent to their customers as compensation for storage and services rendered, although the tires were billed to them in form indicating intended sales, and some of them were billed out to plaintiff's customers in form as sales from defendants, where defendants never assumed to deal with the tires as their own.

TRIAL (32)—REOPENING CASE—DISCRETION. The denial of an application to reopen the case for further evidence is not an abuse of discretion, where the evidence tendered would not have changed the result.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered March 13, 1920, upon findings in favor of the defendants, in an action on contract, tried to the court. Affirmed.

Nelson R. Anderson, for appellant.

Hastings & Stedman, for respondents.

PARKER, J.—The plaintiff seeks recovery from the defendants upon alleged sales of two lots of automobile tires which were delivered from his wholesale house in Seattle to their place of business in the southern part of the city in October, 1919. Trial in the superior

¹Reported in 192 Pac. 7.

court sitting without a jury resulted in findings and judgment in favor of the defendants, denying recovery, from which the plaintiff has appealed to this court.

The dealing and agreement under which the tires were delivered to respondents was had between respondents and one Dean, a salesman and agent of appellant, who was admittedly authorized not only to sell tires to the trade, but was also authorized to collect the purchase price therefor. The controversy here presented is more over the inferences to be drawn from the evidence than over the facts themselves, which are not seriously in dispute, and may be summarized as follows: In the spring of 1919, negotiations commenced between Dean and respondents, resulting in an agreement which was, in substance, that tires should be delivered to and left in storage with the respondents at their place of business, to accommodate the trade in that part of the city. Respondents were not to be considered as purchasing the tires from appellant upon delivery, or at any other time, except as to such of the tires as they actually made sales of to their own customers, which they were privileged to do, and upon making such sales, the tires so sold were to be paid for by respondents and be regarded as being then purchased by respondents from appellant. It was understood that, upon Dean making sales of tires to respondents' customers in that part of the city, delivery should be made from the tires in storage with respondents, and they were to have five per cent upon such sales, when collections were made therefor, as their compensation for storage, attending to sending the tires out, and keeping accounts of such sales. It seems to have been understood between Dean and respondents that the tires should be billed out to appellant's customers by respondents in form as sales from

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respondents to such customers. Dean seems to have looked after the collections, as was contemplated by the agreement. Dean and respondents would have a settlement early in each month of the business of the preceding month, when respondents would pay for the tires they had sold, and also for such others on hand as they desired then to purchase for themselves, and at such settlements they received five per cent on the tires which had been delivered from the storage stock upon the sales made by Dean. It so happened that, at each monthly settlement up to and including September, there were seldom any of the tires of the previous months' deliveries from appellant to respondents left on hand, and that what few were so left on hand respondents then purchased and paid for, as they did with reference to tires sold to their customers. The business relations between respondents and appellant, represented by Dean, proceeded in this manner and settlements were made accordingly for the months of May to September, inclusive. All of the tires, including those here in controversy, were sent from appellant's wholesale house to respondents' place of business at the instance of Dean, and without any request or order therefor on the part of respondents.

On October 7, Dean caused to be delivered from appellant's wholesale house to respondents' place of business fifty tires, respondents assuming on receiving them that the tires were sent under the same arrangement as those they had theretofore received. This was a much larger number of tires than had been sent them during any previous month. There was, at the same time, sent by appellant, and evidently received by respondents a day or so later, a bill for these tires, in form indicating an intended sale of the tires to respondents, specifying the wholesale price, which was

apparently the manner in which the former deliveries of tires had been charged, in form, by appellant against respondents. A few days later, respondents called up appellant's place of business and talked with Dean over the telephone, telling him they did not want so many tires on hand at their place of business, and asked him to take them away. Dean promised to do so, and a few days later came to respondents' place of business and caused the tires to be taken away by a transfer man whom he hired for that purpose. At Dean's request, respondents billed the fifty tires to one Minkov, as other tires had been billed to appellant's customers to whom Dean had sold them, as requested by Dean. This is the first lot of tires for the sale of which appellant seeks recovery. On October 18, Dean caused to be delivered from appellant's wholesale house to respondents' place of business another lot of fifty tires, respondents assuming in receiving them that the tires were sent under the same arrangement as those theretofore received. They were billed in the same manner as the first lot of tires here in question. Demand for payment having been made for these two lots of tires early in November, on November 5, 1919, respondents wrote to appellant as follows:

"We beg to advise you that we have on hand fifty 30x3½ casings, which were sent to us under your invoice of October 18th, without our authority, either written or oral, are now on hand, subject to your disposition.

"We also have your statement of our account for the month of October, and beg to advise that other casings covered by these charges have been taken away upon instructions of your representative, having never been accepted by us as a purchase, and we are compelled to advise you that these charges should be cancelled."

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Respondents' dealings were wholly with Dean, appellant's representative. They never saw or had any talk with appellant until the latter part of October, at which time appellant claims that he made remarks to them such as would indicate his understanding that the tires were sold and not merely consigned to respondents, and that respondents then made no protest against such view of the matter. We think, however, the testimony of respondents is such as to call for the conclusion that there was nothing either said or done which would call for respondents at that time making any such protest, but that their letter of November 5, quoted above, was as prompt a protest against appellant's demand for payment as for a sale of the tires as the circumstances called for. This action was commenced on November 12.

Contention is made on appellant's behalf that respondents' defense is, in legal effect, an affirmative defense, and not having been pleaded as such, was unavailing to them. We do not think that the proving of the agreement between them and Dean as to the conditions under which they received the tires was the proving of an affirmative defense, in a legal sense. The only purpose of such proof was to show that the alleged sale contracts sued upon were never made. While this proof may be regarded as affirmative in form, it was, in fact, negative in effect, in that it tended to show that the alleged sale contracts were never, either expressly or impliedly, made. The proof was, therefore, admissible under the denials of the answer. *Puget Sound Iron Co. v. Worthington*, 2 Wash. Terr. 472, 7 Pac. 882, 886; *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586; *Davidson Fruit Co. v. Produce Dist. Co.*, 74 Wash. 551,

134 Pac. 510; *Smith Sand & Gravel Co. v. Corbin*, 75 Wash. 635, 135 Pac. 472.

The contentions made in appellant's behalf touching the merits proceed upon the theory that there were, in any event, implied contracts between appellant and respondents for the sale of these two lots of tires. Counsel invokes the rule as stated in 35 Cyc. 59, as follows:

"If one sends or delivers goods to another, under circumstances which indicate that a sale is intended, but no price is named, and the other uses or otherwise deals with them as his own, a sale for a reasonable price is implied. If the person sending or delivering the goods names a price, and the other deals with the goods as his own, a sale for the price named is implied."

As to the first lot of tires received by respondents on October 7, the only circumstances we regard as tending to show an intended sale therefor are the sending of the bill by appellant to respondents, not with the tires, but so that respondents received the bill thereafter, which bill was in form such as to indicate an intended sale by appellant at the wholesale price; and the billing of the tires by respondents to Minkov, at the request of Dean, when he took the tires away and delivered them to Minkov on October 17. As to the second lot of tires received by respondents on October 18, the only circumstance we regard as tending to show an intended sale therefor is the sending of the bill therefor by appellant to respondents, not with the tires, but so that respondents received the bill soon thereafter, which bill was in form such as to indicate an intended sale by appellant to respondents at the wholesale price. It is plain that respondents did not, in any manner, deal with this second lot of tires as their own. They merely received them and let them

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remain at their place, where appellant, as at all times, had been free to come and get them, as the judgment of the trial court expressly permitted him to do.

Assuming for the present that Dean was authorized, as appellant's salesman and agent, to make the agreement he made with respondents, it seems plain to us that the fact that the tires were billed by appellant to respondents in form indicating intended sales, and the fact that respondents billed the first lot of tires to Minkov, in form indicating a sale thereof, requested by Dean, under all the circumstances, does not call for the conclusion that there arose an implied contract for the sale of either of these lots of tires from appellant to respondents, since respondents did not assume to deal with the tires as their own so as to bind them as purchasers thereof from appellant—that is, did not assume to deal with the tires as their own, as between themselves and the appellant. Dean caused the tires to be brought to respondents' place of business without any order therefor on the part of respondents, caused the lot received October 7th to be taken away, respondents doing nothing with reference thereto except what Dean requested them to do, and doing nothing with reference to the lot received October 18th, save to allow them to remain at their place of business, under protest.

But counsel's argument seemingly proceeds largely upon the theory that Dean, as sales and collection agent for appellant, did not have authority to make such an agreement as he made with respondents relative to the storage and disposition of the tires. There may be substantial ground to rest such an argument upon, but even if that be so, we fail to see how, under the circumstances, that would sustain the contention that there arose an implied sale of these two lots of

tires from appellant to respondents. If Dean did not have authority to make such a contract, the fact still remains that he did not make a sale of these tires from appellant to respondents. So the question still remains, did respondents deal with the tires as their own in such manner that the law will imply a contract of purchase by them from the appellant? We think not. They simply allowed Dean to cause the tires to be brought to their place of business and allowed Dean to cause the first lot of tires to be taken away, the second lot still remaining at their place of business, over their protest. The billing of the tires by respondents to Minkov, if unexplained, would be a circumstance pointing rather strongly to the arising of an implied contract of sale between the appellant and respondents as to those tires; but, under the circumstances, we think such act on respondents' part, done at the request of Dean, is not sufficient to estop them from successfully asserting that an implied contract did not arise.

Appellant seeks to recover upon two or three other small items, but it is so plain from the record that respondents never received the goods so sought to be charged against them that we deem it sufficient to say, as to these items, that the appeal is wholly without merit.

Contention is made that the trial court erred in refusing to open the case for the production of further evidence by appellant. The record quite convinces us that the opening of the case and the receiving of the evidence so tendered would not have changed the result, and that, therefore, the court did not abuse its discretion in denying the application.

The judgment is affirmed.

HOLCOMB, C. J., MAIN, and MITCHELL, JJ., concur.

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[No. 15809. Department One. August 9, 1920.]

MAUDE C. BEEBE, *Appellant*, v. L. C. ALLISON,
Respondent.¹

PARTNERSHIP (5, 18)—CREATION OF RELATION—AGREEMENT WITH MEMBER OF FIRM. The voluntary consent of all members being required to form a partnership, a third person cannot become a member thereof without concurrence of all members of the firm.

SAME (8)—CREATION OF RELATION—ESTOPPEL—DECLARATIONS OF PARTY. Declarations made by a person under the belief that he was a member of a partnership do not constitute him a partner by estoppel or otherwise as to the rights of third persons, it not being shown that credit was extended upon the faith of his being a member of the firm.

APPEAL (416)—REVIEW—FINDINGS. Where a case is brought to the supreme court upon the findings alone, the respondent is entitled to the most favorable inference that can be drawn therefrom, there being a presumption of regularity and of sufficient facts to sustain the judgment.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 10, 1920, upon findings in favor of the defendant, in an action for rent, tried to the court. Affirmed.

Poe & Falknor, for appellant.

Chadwick, McMicken, Ramsey & Rupp and *Maurice R. McMicken*, for respondent.

PARKER, J.—The plaintiff, Beebe, commenced this action in the superior court for King county, seeking recovery of \$226.66, due to her from F. L. Main & Company, copartners, for rent of certain premises occupied by them as her tenants. Allison being the only defendant served with summons in the action, and there being no dispute as to the firm of F. L. Main & Company owing the plaintiff rent in that sum, upon

¹Reported in 192 Pac. 17.

the trial in the superior court, the sole controversy became one of whether or not the defendant Allison was a member of the defendant partnership so as to render him liable for the payment of the rent. Trial to the court without a jury resulted in findings and judgment in favor of Allison, absolving him from liability, upon the ground that he was not a member of the defendant partnership. From this disposition of the cause, the plaintiff has appealed to this court.

The facts to be here considered are all embodied in the trial court's findings, there being no statement of facts in the record before us. They may be summarized as follows: In October, 1918, the exact date not appearing in the record, a writing was signed by F. L. Main and defendant Allison, and not by any other member of the firm of F. L. Main & Company, the whole of which reads as follows:

“F. L. Main & Company

“Stocks & Bonds

“Suite 355 Empire Bldg.,

“Seattle, Washington

“F. L. Main, Gen. Mgr.

“Agreement.

“It is hereby understood and agreed that L. C. Allison, party of the first part in this agreement, is desirous of procuring for himself an interest in F. L. Main & Company, party of the second part, a co-partnership operated in Seattle, Washington, 355 Empire Building, by F. L. Main, C. B. Collins, B. S. Dennison, all of the city of Seattle.

“It is understood and agreed that, for and in consideration of one (\$1) dollar and other valuable services rendered, that said L. C. Allison of the city of Los Angeles, California, shall and does hereby purchase a one-fourth ($\frac{1}{4}$) interest in the said F. L. Main & Company, to be operated as a co-partnership, the said four being L. C. Allison, F. L. Main, C. B. Collins, and B. S. Dennison.

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"The profits of said F. L. Main & Company are to be divided equally among the said four at any time which may be mutually agreed upon and it is further understood and agreed that neither one or anyone of said firm may draw a dividend without the one drawing, desiring a dividend, seeing that an equal amount of money is drawn and placed to the credit in any bank designated by them for the remaining members absent, and it is further agreed that this contract pertains to all business done in the future of this firm of this date on the Liberty Low Grade Fuel Corporation or any other propositions which may be taken on or underwritten by the said F. L. Main & Company which may be mutually agreed upon by all of the parties hereto.

"Witness:

Signed F. L. Main,

"Daisy Evans

Signed L. C. Allison."

When Allison signed this writing he was in California, Main evidently signing it while in Seattle. After the signing of the writing, Allison came to Seattle, arriving there on November 4, 1918, from which time until November 9, 1918, he occupied desk room in the office of F. L. Main & Company, laboring under the impression that he was a partner in the firm, and undertaking to "negotiate contracts and make deals" in the name of the firm, and "announced to various parties that he was a partner of defendant F. L. Main & Company, although none of said statements are shown to have been made to plaintiff or to any one representing the plaintiff." On November 9, 1918, which it will be noticed was only five days after Allison came to Seattle, he "paid to F. L. Main between \$600 and \$1,000, and which sum said L. C. Allison presumed he was paying to F. L. Main and other partners of F. L. Main & Co., at which time said instrument hereinbefore copied was marked 'cancelled,' together with the other contracts." What the other contracts were is not shown; nor is the purpose of the payment

so made shown. It is evident, however, that all further steps looking to Allison's becoming a member of the partnership then ceased. The findings contain no suggestion that Allison thereafter made any statement to any one, or that he did any act in any way evidencing his partnership relation in the firm. The rent sought to be recovered was for the occupancy by F. L. Main & Company of the property of the plaintiff between the first and seventeenth days of November, 1918, which rent "became due on the first day of November, 1918"; which date, it will be noticed, was before Allison had in any manner assumed the relationship of a partner in the firm. It is apparent that Allison learned on November ninth that the contemplated partnership agreement had not been signed by the other members of the firm, and that he and Main then cancelled the writing and abandoned all further efforts looking to Allison's becoming a member of the firm.

The most elementary rules of partnership law, it seems to us, render it plain, in the light of these facts, that Allison did not become a member of the partnership by virtue of this writing signed by Allison and Main, or by virtue of anything he said or did, so as to render him liable to the plaintiff. In *Burnett v. Snyder*, 76 N. Y. 344, we have a case almost exactly like this. In holding that a partnership could not be so created, Judge Danforth, speaking for the court, said:

"It required the voluntary consent of all these persons to create the firm; and it seems very clear that the declarations of any number less than the whole, however emphatic, that another person was also a member, could have no effect, either upon the firm or upon that person, for the simple reason that it would be untrue. It is also clear that the declaration of

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Snyder could not affect the firm or himself, unless (as is not the case here) he or the firm had been trusted on account of or by reason of that declaration. This is but reiterating the principle of law well established, that as a partnership can commence only by voluntary contract of the parties, so when it is once formed, no third person can be introduced into the firm as a partner, without the concurrence of all the persons who compose the original firm. The consent of one or more to his introduction is not sufficient; (*Kingman v. Spurr*, 7 Pick., 235; *Murray v. Kneeland*, 14 J. R. 318; *Marquand v. N. Y. Manuf. Co.*, 17 id. 534), for, otherwise, says Story, 'it would, in effect, amount to a right of one or more of the partners to change the nature, and terms, and obligations of the original contract, and to take away the *delectus personae*, which is essential to the constitution of a partnership.' (Story, Partnership, § 5)."

See, also, Rowley, Partnership, §§ 49, 552.

These authorities are not only in point in Allison's favor on the question of his becoming a partner by virtue of the writing signed by him and Main, but also on the point that Allison's statements and acts during the five days he was in the office of the firm did not constitute him a partner by estoppel or otherwise as to the rights of the plaintiff, since manifestly the plaintiff's right to the rent sued for accrued before Allison came to Seattle, or said or did anything in the assumption of a partnership relation in the firm. Nor can it be said that the plaintiff extended credit for the rent beyond the first day of November upon the faith of Allison being a member of the firm, for it is not shown that the plaintiff knew of Allison's assumption of any partnership relation in the firm. Indeed, the findings suggest to the contrary. We feel warranted in so assuming because of the general rule so well stated by Judge Chadwick, speaking for the court in *Clark v. Fotheringham*, 100 Wash. 12, 170 Pac. 323, as follows:

"Where a case is brought to this court upon the findings alone, a respondent is entitled to the most favorable inferences that can be drawn from them. This is no more than to say that a presumption of regularity and of sufficient facts to sustain the judgment of the court attends it."

The judgment is affirmed.

HOLCOMB, C. J., MAIN, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15831. Department Two. August 10, 1920.]

W. F. DOONAN, *Appellant*, v. R. ROSSI, *Respondent*.¹

BILLS AND NOTES (140)—CHECKS—INDORSEMENT AND DELIVERY—EVIDENCE—SUFFICIENCY. In an action on checks issued to and indorsed by defendant, in which defendant denied the indorsement and alleged that he lost the checks and immediately stopped payment, plaintiff's evidence is sufficient to make a *prima facie* case, and it is error to grant a nonsuit, where witnesses testified that defendant indorsed the checks, or similar ones, and delivered them to a third person, who gave them to plaintiff in Montana as part payment for liquor purchased, and that such third person upon his return had a dispute with defendant, who then threatened to stop payment on the checks unless he received more money.

SALES (127)—ACTION FOR PRICE—DEFENSES—GOODS SOLD FOR ILLEGAL PURPOSE. The fact that the vendor of liquor knew, or should have known, that it was purchased for the purpose of illegal sale in another state, does not bar an action on checks given for the purchase price, unless it was a part of the contract of sale that it should be so used or sold, or the vendor participated in the transaction otherwise than in the mere making of the sale.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered March 6, 1920, upon granting a nonsuit, dismissing an action to recover on traveler's checks issued by a bank. Reversed.

Allen, Winston & Allen, for appellant.

Charles P. Lund, for respondent.

¹Reported in 191 Pac. 865.

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Opinion Per TOLMAN, J.

TOLMAN, J.—Appellant, as plaintiff, brought this action against the Old National Bank to recover \$500, evidenced by seven traveler's checks issued by it to R. Rossi. By stipulation, Rossi was substituted for the bank as defendant, and he, and not the bank, will be hereinafter referred to as the respondent. At the close of plaintiff's case, the trial court sustained a motion to dismiss the action because of the insufficiency of the evidence, and this appeal followed.

It fairly appears from the evidence introduced that, on October 17, 1918, the Old National Bank issued to respondent seven traveler's checks, three for \$100 each, and four for \$50 each, all payable to the order of respondent. A little later in the same month these same checks were, by one Frank Warren, delivered to appellant at Troy, Montana, as part of the purchase price of certain whiskey then sold and delivered by appellant to Warren. Appellant was engaged lawfully in the liquor business in Montana, having a license under the laws of that state then in force, and neither inquired or knew that the liquor was to be brought to Washington in violation of its laws, though there is enough in the record to indicate that he might very well have suspected Warren of such intent. Thereafter respondent stopped payment on the checks, and when presented in due course, payment was refused.

At the time in question, Warren was conducting a garage in the city of Spokane, and respondent either kept his automobile there or had it there for repairs. Two witnesses testified that respondent was frequently at Warren's garage, and for several days had tried to get different men to take his automobile and go to Montana for liquor, and finally, after several attempts, he induced Warren to agree to go, on the understand-

ing that respondent would furnish the car and the money, and the profits derived from a resale of the liquor would be equally divided. Both of these witnesses testified in detail that respondent, in the garage office, produced these or similar checks, indorsed or countersigned them, and having done so, said, in effect, that he had signed his name on the wrong line, but that the checks would be good anyway, and delivered them all to Warren for the purpose already indicated. Another witness testified to a portion of this conversation heard by him, and further testified that, after Warren returned from Montana, he and respondent had a dispute over their settlement, and respondent told Warren that, unless he received \$150 more, he would stop payment on the checks. To state these facts is sufficient to show that there was ample evidence in connection with the checks themselves, and the signatures which they bear, to make a *prima facie* case and put upon the respondent the burden of establishing his affirmative defense, which was that he did not deliver, assign or countersign the checks to any person, or at all, and that while the checks were in his possession, payable to himself, he lost them from his pocket, and immediately, and for that reason, stopped payment.

The respondent urges that, even though the evidence was sufficient, appellant cannot recover because he knew, or should have known, that the liquor was to be brought into Washington and there sold in violation of the law, and therefore the transaction was against public policy and void.

We have already had occasion to review the authorities upon this question, and after finding that the great weight of authority is to that effect, have laid down the rule:

“We are therefore of the opinion that, where property is sold absolutely and unconditionally, mere

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Statement of Case.

knowledge on the part of the vendor that the property will thereafter be sold illegally, or applied to some illegal or immoral use, will not bar an action to recover the purchase price, unless it is a part of the contract of sale that the property shall be so sold or used, or unless the vendor aids or participates in the illegal objects otherwise than by the mere act of making the sale." *Washington Liquor Co. v. Shaw*, 38 Wash. 398, 80 Pac. 536, reported also in 3 Am. & Eng. Ann. Cas. 153, where an exhaustive note will be found.

We see no sufficient reason at this time for a departure from the rule there stated.

The judgment of the trial court is reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15818. *En Banc*. August 10, 1920.]

MARY JANE LUBY, *Appellant*, v. INDUSTRIAL INSURANCE COMMISSION, *Respondent*.¹

MASTER AND SERVANT (20-1)—WORKMEN'S COMPENSATION ACT—RAILROAD EMPLOYEES—STATUTES—CONSTRUCTION. Under Laws of 1917, p. 96, § 19, amending Rem. Code, § 6604-18 by exempting from the operation of the industrial insurance act all employees engaged in maintenance work upon railroads engaged in interstate and intrastate commerce and making no distinction as to whether such work be performed directly or through an independent contractor, a painter employed by an independent contractor painting bridges of a railroad engaged in interstate commerce, is not within the protection of the industrial insurance act, and no award from the insurance fund can be made to his widow upon his death subsequent to the amendment of the act.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered March 16, 1920,

¹Reported in 191 Pac. 855.

upon sustaining a demurrer to the complaint, dismissing proceedings in review of an order of the industrial insurance commission. *Affirmed.*

Geo. T. Reid, J. W. Quick and L. B. da Ponte, for appellant.

The Attorney General, for respondent.

Allen, Winston & Allen, amici curiae.

FULLERTON, J.—This is an appeal by the plaintiff, Mary Jane Luby, from a judgment entered by the superior court of Lewis county, dismissing her complaint brought in review of an order of the industrial insurance commission. The commission appeared by general demurrer, which the trial court sustained, entering the judgment appealed from, after the plaintiff had elected to stand on her complaint and had refused to plead further. The ultimate question before us therefore is, does the complaint state facts sufficient to constitute a cause of action.

The facts stated in the complaint are, in substance, these: On May 26, 1919, the Director General of Railroads, then operating the lines of the Northern Pacific Railway Company, under the provisions of the Federal statute relating to government control and operation of railroads, entered into a contract with one August Gerske, of Chicago, Illinois, by the terms of which Gerske, for a stated consideration, agreed to clean and paint some twenty-five bridges situated on the line of the railroad of the railway company named within the state of Washington. The contract provided that Gerske should personally superintend the work, that he should furnish all of the labor and materials necessary for carrying it on, should have full control of all the employees engaged upon it, and should be solely responsible for any liability which might arise because

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of personal injuries suffered by any of the workmen whom he should employ upon it.

After entering into the contract, Gerske came to the state of Washington for the purpose of entering upon its performance. He brought with him from Chicago a number of experienced bridge painters to perform the labor of painting, among whom was John A. Luby, the husband of the plaintiff. After reaching the state and before entering upon the work, Gerske communicated in writing with the industrial insurance commission, in which he stated to them the nature of his contract and the fact that he was about to commence work thereunder, and inquired whether the work came within the provisions of the workmen's compensation act. He was informed that it did, and thereupon returned to the commission an estimate of his pay roll and paid into the state treasury the percentage thereof required by that act.

Gerske thereupon entered upon the performance of his contract, and while engaged in cleaning and painting a bridge extending over the Chehalis river, in Lewis county, his employee, Luby, fell therefrom, receiving injuries from which he died a short time later. Due proofs of the death and the cause thereof were made to the industrial insurance commission in the manner prescribed by their rules.

The bridge from which Luby fell was a bridge included within the contract of Gerske, and formed at the time of the work a part of the line of railway of the Northern Pacific Railway Company, and was then being used in the operation of trains carrying both interstate and intrastate passengers and freight.

In due time the plaintiff, as the widow of John A. Luby, on behalf of herself and her minor children, filed a claim with the industrial insurance commission

for compensation for the death of her husband, under the provisions of the workmen's compensation act. The claim was rejected for the stated reason that "August Gerske, the employer of John A. Luby, and the men employed by said Gerske, including said John A. Luby, in the work of painting bridges on said line of railroad, were engaged in interstate commerce, and were not, therefore, under the scope and provisions of the workmen's compensation act of the state of Washington."

The trial court rested his decision on the authority of the case of *State v. Bates & Rogers Construction Co.*, 91 Wash. 181, 157 Pac. 482, and the learned counsel representing the plaintiff concedes in his brief that, if the court is to adhere to the principle of that case, it is conclusive against the plaintiff's right of recovery: devoting an argument to a showing that the case was incorrectly determined. But the trial court in its decision does not notice the very radical change in the statute made by the legislature subsequent to the decision of the case cited and prior to the transaction out of which the present controversy arises. This change, we think, presents the vital question in the case, and requires an affirmance of the judgment, regardless of any conclusion that may be reached on the question of the soundness or unsoundness of the cited case.

The section of the industrial insurance act which the court had in review when the decision cited was rendered, is found at § 6604-18 of the Code (Remington's), and reads as follows:

"The provisions of this act shall apply to employers and workmen engaged in intrastate and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate

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work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his workmen working only in this state may, with the approval of the department, and so far as not forbidden by any act of congress, voluntarily accept the provisions of this act by filing written acceptances with the department. Such acceptances, when filed with and approved by the department, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid."

The court, in the case cited, construed this statute as exempting from the operation of the act all employers and workmen engaged in interstate or foreign commerce for whom a rule of liability or method of compensation had been established by the Congress of the United States; and held that such a rule of liability had been established by the Congress by the fifth section of the Federal employer's liability act. From this the conclusion was drawn that, since the facts of the case disclosed that the work involved therein was work in repair of a railroad bridge used by a railroad company in the carriage of interstate commerce, the workmen were without the provisions of the act, notwithstanding they were not direct employees of the railroad company, but employees of an independent contractor.

The amendatory statute referred to is found in the act of the legislature of 1917. Laws of 1917, ch. 28, p. 96, § 19. It provides that the section of the statute above cited shall be amended to read as follows:

"Inasmuch as it has proved impossible in the case of employees engaged in maintenance and operation of railways doing interstate, foreign and intrastate commerce, and in maintenance and construction of

their equipment, to separate and distinguish the connection of such employees with interests or foreign commerce from their connection with intrastate commerce, and such employees have, in fact, received no compensation under this act, the provisions of this act shall not apply to work performed in the maintenance and operation of such railroads or performed in the maintenance or construction of their equipment, or to the employees engaged therein, but nothing herein shall be construed as excluding from the operation of this act railroad construction work, or the employees engaged thereon: Provided, however, That common carriers by railroad engaged in such interstate or foreign commerce and in intrastate commerce shall, in all cases where liability does not exist under the laws of the United States, be liable in damages to any person suffering injury while employed by such carrier, or in case of the death of such employee to his surviving wife and child, or children, and if no surviving wife or child or children, then to the parents, sisters, or minor brothers, residents of the United States at the time of such death and who were dependent upon such deceased for support, to the same extent and subject to the same limitations as the liability now existing, or hereafter created, by the laws of the United States governing recoveries by railroad employees injured while engaged in interstate commerce."

This section, it will be observed, especially and in direct terms provides that the provisions of the industrial insurance act shall not apply to work performed in the maintenance of railroads engaged in interstate, foreign and intrastate commerce, nor to employees in such work. It makes no distinction with regard to the manner in which the railroad company performs the work; that is, whether it performs the work directly by employees hired and paid by it, or whether it performs the work through an independent contractor who undertakes the work for a stated consideration with the understanding and agreement that he is to employ and

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pay for the necessary laborers—in either event, the employees are without the provisions of the act. In other words, it is the character of the work that excludes, not the method by which the work may be performed.

The facts in the record show that the unfortunate workman for whose death compensation is claimed was, at the time of his death, employed in maintenance work upon a railroad engaged at the time in interstate, foreign and intrastate commerce. This is not only the necessary conclusion from the recitals of the facts contained in the complaint, but it is also made a direct and positive allegation thereof. They show further that he was employed, and his death occurred, after the enactment of the statute of 1917. The plaintiff's rights, therefore, must depend upon that statute, and cannot be affected in any manner by the construction this court may have given to the former one which it supersedes. The question, therefore, whether the cited case was correctly or incorrectly decided is moot, in so far as the present controversy is concerned, and no useful purpose would be subserved by entering upon such an inquiry.

The appellant's counsel, as well as the *Attorney General*, appreciating the difference in the statutes, calls attention to the fact that the exclusion of railway employees from the benefits of the provisions of the industrial insurance act will result in relegating them in many instances to a common law action to recover for injuries received by them in which the common law defenses will be applicable on the part of employers, and argues that a better construction of the statute than the one we have indicated would be to hold that the exemption applies only in those instances where the workman is in the immediate

employment of the railroad company, and not in instances where he is the employee of an independent contractor. But, while we appreciate the humane side of the argument, it is not our opinion that the statute is of doubtful meaning, and thus open to interpretation. We cannot read it otherwise than that the legislature has thereby exempted from the operation of the industrial insurance act all employees engaged in maintenance work upon railroads engaged in interstate and intrastate commerce, without regard to the fact whether they are employed to perform the work by the railway company itself or by an independent contractor. For the court, therefore, to read into the statute such an exception would be to legislate and not to construe.

The judgment is affirmed.

ALL CONCUR.

[No. 15829. Department Two. August 10, 1920.]

MAUD O'NEIL, *Respondent*, v. GARRETT W. O'NEIL,
Appellant.¹

DIVORCE (104)—CUSTODY AND SUPPORT OF CHILD—MODIFICATION OF DECREE. Where, on appeal by the father from a judgment on petition to modify a divorce decree, which affirmed the original decree awarding custody of a minor daughter to the mother, the supreme court concludes that the mother is not a suitable person to have the custody and control of the daughter, but is unable, under the record, to advise the trial court what disposition should be made of the daughter owing to her hostile attitude toward the father at the time of trial, the judgment will be reversed and remanded for a further hearing to enable the trial court to award the custody to some person other than the mother, preferably to the father, if there has been a reconciliation between them.

Appeal from a judgment of the superior court for King county, Frater, J., entered December 16, 1919,

¹Reported in 191 Pac. 849.

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denying a petition for the modification of a decree of divorce, tried to the court. Reversed.

Arthur H. Hutchinson, for appellant.

Tucker & Hyland, for respondent.

BRIDGES, J.—In 1914, the appellant and respondent were divorced by decree of the superior court of King county, Washington. The decree awarded to the respondent the care, custody and control of the two minor daughters, Gwyneth, then aged 12 years, and Natalie, then aged 10 years. By its terms the property was divided between the parties, and the appellant was required to pay to the respondent, for the use and benefit of the minor daughters, \$4,200, at the rate of \$40 per month until the further order of the court. The decree impressed a lien upon the property of the appellant as security for these payments.

In 1918, the appellant petitioned the court for a modification of the original decree of divorce, wherein he alleged that the respondent was an unfit person to have the care, custody and control of the minor daughters, and sought to have them taken from her and awarded to him, or to someone else suitable to the court; the petition also sought to have the original decree so further modified as to require the monthly payments to be made to some person other than the respondent. In April, 1919, this petition came on for hearing and a large amount of testimony was taken. The actual decision of the matter was by the court postponed until December, 1919, at which time some further testimony was taken. The delay in making the final judgment appears, in part at least, to have been the result of an effort upon the part of the trial

court personally to bring about some amicable adjustment of this dispute, or, at any rate, some satisfactory disposition of these matters. Previous to the hearing on the petition, the minors had been, at least temporarily, taken from the respondent and had become wards of the juvenile court, under whose directions they were placed in the House of the Good Shepherd, in Seattle. Before the conclusion of this matter in the trial court, the minors had been taken by the court from the House of the Good Shepherd and returned to the custody of respondent, their mother, pending final determination of the petition.

The judgment on the petition for modification of the original decree affirmed all the terms and provisions thereof, except it required that the appellant make his monthly payments to the clerk of the court of King county instead of to the respondent. From this judgment, appeal was taken.

It would not serve any good purpose, but, on the contrary, would probably be detrimental to those interested, for us to here recite the testimony in this case. Suffice it to say we have very carefully read and considered the whole record and have concluded that the respondent is not a suitable person to have the care, custody and control of the minor daughter, Natalie. She is now about sixteen years old; her sister Gwyneth is past eighteen years of age and has, therefore, reached her majority, and this appeal no longer materially affects her. We are satisfied that a fortunate solution of this unfortunate problem would be to award the minor daughter to her father, the appellant here, were it not for the feeling of the daughter toward her father. The testimony shows that, when this case was tried, she had become embittered against him and would have nothing to do with him. If such

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situation still exists, it would probably be unwise to undertake to place her in the custody of her father.

We have also concluded that the monthly payments of \$40 should be made exclusively for the benefit of the minor daughter until the further order of the court.

Under the present condition of the record, it is exceedingly difficult, if not quite impossible, for us to advise the lower court of the exact disposition that should be made of the minor daughter. It has been many months since the testimony in this case was taken, and it is not impossible that by this time the situation has changed. The taking of additional testimony may, and probably will, assist the trial court in carrying out the directions and the spirit of this opinion.

The judgment appealed from is reversed and remanded with instructions to the trial court to have a further hearing and taking of testimony only for the purpose of assisting the court in determining what disposition should be made at this time of such minor daughter, and upon such hearing being had, it is directed that the trial court set aside the judgment appealed from and make and cause to be entered another judgment which shall so modify the original decree as to take from the respondent the care, custody and control of such minor daughter and give such care, custody and control to some person or persons other than respondent, preferably to the appellant, if there has been a reconciliation, or make such other disposition of her as shall appear best to the trial court; and said judgment shall also so modify the original decree as to require that all future monthly payments be made to some person to be designated by the court, other than respondent, and that all such payments shall henceforth be for the sole use and benefit of such minor daughter until she shall come of age, or until the

further order of the court. Neither party hereto shall recover any costs herein.

HOLCOMB, C. J., FULLERTON, MOUNT, and TOLMAN, JJ., concur.

[No. 15852. Department Two. August 10, 1920.]

FRANK W. BEEMAN, *Respondent*, v. TACOMA RAILWAY & POWER COMPANY, *Appellant*.¹

STREET RAILROADS (30)—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence of the driver of an auto truck struck by a street car is a question for the jury, where there was evidence that he attempted to cross the tracks at a street intersection after giving the proper signal and noticing an approaching car on the other track some 125 feet distant from the intersection, that the truck skidded and in attempting to stop the skidding he killed his engine and was struck by the approaching car, and that he had ample time to cross had his truck not skidded and the engine killed, and that the street car was a "one man car" and that the motorman was busy making change with a passenger at or shortly before the collision occurred.

SAME (33)—COLLISION AT CROSSING—DUTY OF MOTORMAN AND DRIVER—INSTRUCTIONS. In such a case, it was proper to instruct the jury that the driver, in approaching the crossing, had a right to presume that the motorman was keeping his car under such reasonable control as was commensurate with the situation at such point.

DAMAGES (80)—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$2,000 for injuries sustained by the driver of a truck in collision with a street car is not excessive, where he sustained cuts over the ear and eye and the right temple region which tore away part of the temple muscle and required several stitches, and that he had not regained use of the muscles at that point at the time of the trial and still suffered pain and headaches.

Appeal from a judgment of the superior court for Pierce county, Fletcher, J., entered November 3, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained

¹Reported in 191 Pac. 813.

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by a truck driver through a collision with a street car.
Affirmed.

F. D. Oakley, for appellant.

Harry H. Johnston, for respondent.

BRIDGES, J.—This is a personal injury suit. There was a verdict of the jury in the sum of \$2,000. At the conclusion of the plaintiff's case, the defendant moved for a nonsuit, which was denied by the court. At the close of the taking of all the testimony, there was a motion for an instructed verdict for the defendant, which motion was denied. Defendant's motion for a new trial was also refused. Thereafter judgment was entered on the verdict in favor of the plaintiff and against the defendant in the sum of \$2,000. From this judgment, the defendant has appealed to this court.

The testimony tended to show the following facts: The respondent was an experienced Ford truck driver and was in the employ of the Olympic Ice Cream Company, of Tacoma, Washington. On February 26, 1919, he was driving his truck south on Pacific avenue in Tacoma, and intended to turn to the left and cross that avenue at Twenty-second street and continue easterly on that street for the purpose of going to the factory where he was employed. For three or four blocks on Pacific avenue north of Twenty-second street he had been driving at the rate of about ten miles per hour, and for that distance, or most of it, one of appellant's street cars was following him, going at about the same rate of speed. Pacific avenue has two street car tracks upon it, located near the center of the street, the westerly track being for south-bound cars and the easterly track for the north-bound cars. The corner of Pacific avenue and Twenty-second street is a busy and important intersection of streets in the city of Tacoma.

As respondent approached this intersection, the south-bound car which had been following him was about one hundred feet back of him; he gave a signal by throwing out his left arm, showing that he intended to cross Pacific avenue at Twenty-second street; and at about the time of turning into that street, or a little before that time, he saw coming toward him a street car on the easterly track and going northerly along Pacific avenue. At that time the north-bound car, according to plaintiff's testimony, was about one hundred to one hundred and twenty-five feet south of the center of the intersection of the two streets; it was raining and the street was wet and slippery; when the rear wheels of his truck struck the west rail of the street car track, they skidded, so as to practically stop the forward motion of the truck, and in order to stop the skidding, he threw the clutch into neutral. As soon as the car ceased to skid, he immediately engaged the clutch, but only succeeded in moving the truck three or four feet, when the engine stopped running, thus leaving him stalled on the easterly street car track. At this time the north-bound car was some thirty or forty feet from him. The street car did not appear to decrease its speed as it approached respondent, but hit his truck with great force, derailing the street car and carrying the truck over the street to the curb, a distance of more than one hundred feet. He further testified that, when he started to cross Pacific avenue, he thought he had, and, as a matter of fact, did have, ample time to get across ahead of the street cars, and that he would easily have made the crossing had not his car started to skid and had he not "killed" his engine.

There was also testimony to the effect that, a block or two south of Twenty-second street, three passengers had come aboard the north-bound car, and, among the others, a Japanese, who gave to the conductor, who

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was also the motorman, a two-dollar bill, and he was given small change therefor; that, as the car approached Twenty-second street, the motorman was counting out the change and handing it to the passenger, and was looking in the direction of the passenger, and that the collision with the truck occurred at once after the change was handed to the passenger, and that the collision caused the passenger to drop the change on the floor of the car. The car in question was what is known as a "one-man" car, the motorman acting also as conductor.

It is vigorously argued by the appellant that, under the decisions of this court, the respondent was, as a matter of law, guilty of contributory negligence, and that appellant's motion for nonsuit and for a directed verdict should have been granted. Appellant cites many cases from this and other courts, but the facts in this case are so at variance with the facts in all of the cases cited that we find them all inapplicable and that they give us very little assistance. Appellant particularly seems to rely on *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458; *Fluhart v. Seattle Elec. Co.*, 65 Wash. 291, 118 Pac. 51; and *Beeman v. Puget Sound T. L. & P. Co.*, 79 Wash. 137, 139 Pac. 1087.

In the *Beeman* case, the plaintiff, who was a pedestrian, was crossing one of the streets in the city of Seattle. As he stepped on the sidewalk, he looked up the street and saw a street car coming toward him, and was, he thought, about four hundred and fifty feet away. It was dark and the street car was carrying a headlight. The plaintiff was picking his way across the muddy street, when he was struck by the car and injured. Under the facts of that case, the court held that the plaintiff was guilty of contributory negligence and could not recover.

In the *Helliesen* case, *supra*, the facts were that the plaintiff was intending to cross Bellevue avenue, and as she came to that street she saw two cars, one headed east and the other west. Thinking she had time to cross the street before the cars should reach the intersection, she started across and was struck by one of them. The court held that, under the physical facts shown to exist, it was plain that plaintiff did not look for the approach of cars before she attempted to cross; that, had she looked, she must have seen the car near her, and that it was dangerous for her to attempt to cross.

In the *Fluhart* case, the facts were that a pedestrian was held to be guilty of contributory negligence where he stepped in front of a well-lighted approaching car, and which he could have seen a block away.

We cannot here review all the cases cited by appellant. Suffice it to say that each case rested upon facts very different from those shown by the plaintiff to exist here. The law of each personal injury case must, to a very large extent, depend upon the facts of that case. In this case, if the plaintiff's testimony is to be believed, he had ample time to make the crossing in front of the street car which hit him, and the reason he did not succeed was that his truck unexpectedly skidded, and that, as the indirect result thereof, he "killed" his engine, and his truck was left helpless on the street car track. He testified that, when he started to make the crossing, the car which hit him was from one hundred to one hundred and twenty-five feet from the place where he would cross, and that, after he had been delayed by the skidding of his car, the consequent necessity to check its forward movement to stop the skidding, the shifting of gears and the final "killing" of his engine, the street car was still some thirty or forty feet from him. Under facts such as these, we

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cannot say, as a matter of law, that he was guilty of negligence. The question of his negligence was for the jury. It is true appellant produced much testimony tending to show that respondent was reckless in attempting to cross; that the car following him was at all times immediately at his heels, and the car which struck him was so close to him when he turned for the crossing that an accident was almost inevitable. But the jury had a right to believe that the facts existed as shown by respondent. The testimony was contradictory and the jury had a right to pass on it.

Appellant takes exception to the following instructions given by the court to the jury:

"The driver of a vehicle approaching a street car crossing is entitled to presume that an approaching street car will be moved at that point under control of the motorman who is keeping a reasonable lookout ahead, and is keeping his car under such reasonable control as is commensurate with the situation at such point, having due regard to the general traffic and the probable danger of collision, and the conduct of the driver of a vehicle in attempting to cross in face of an approaching street car is to be measured with regard to his right to rely on the street car being under such control, and the opportunity of the motorman to observe in making such crossing.

"It is not necessarily negligence for a driver of an automobile truck to attempt to cross over a street car track at a crossing in face of an approaching car, if under all the circumstances a reasonably careful driver would be justified in believing that he could pass over in safety, relying on the duty that both he and those in charge of the street car must act with reasonable regard to the rights of others."

It is contended that these instructions are wrong because "they informed the jury that the respondent had a right to presume that the motorman was keeping his car under such reasonable control as was com-

mensurate with the situation at this point," whereas the respondent, having seen the car approaching, could not rely on any such presumptions. But we think the instructions, while general in their nature, not only state the law as it should be, but as it has often been announced by this court.

In the case of *Richmond v. Tacoma R. & Power Co.*, 67 Wash. 444, 122 Pac. 351, this court said: "a pedestrian is justified in ordering his movements upon the assumption that street cars will be operated, not only in conformity with local laws, but with a high degree of care and with due regard to public travel on the street." *Chisholm v. Seattle Elec. Co.*, 27 Wash. 237, 67 Pac. 601; *Mallet v. Seattle, Renton & S. R. Co.*, 66 Wash. 251, 119 Pac. 743. Appellant cites *Beeman v. Puget Sound T. L. & P. Co.*, *supra*, in support of its argument against these instructions. But that case goes no farther on this point than to hold that one traveling a street may not implicitly and blindly rely upon the presumption that the street car will be operated with due care; that he cannot rely upon such presumption to the point that he need not exercise care for himself; that one may not see a car coming toward him at an excessive rate of speed and still rely on the presumption that it will not violate the speed ordinances. In short, that case, in substance, holds that one may not rely on presumptions which he knows are being violated. We cannot find any substantial error in the instructions complained of.

Complaint is also made that the court did not give certain requested instructions. We think the instructions given by this court amply covered those requested. In fact, the instructions are very full and they fairly presented to the jury all the issues involved.

Appellant further contends that the verdict, which was for \$2,000, was excessive and that it should have

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been given a new trial on that account. The testimony shows that respondent's injuries consisted of a slight cut over the right ear, and another cut about an inch long over the center of the right eye, and a large semi-circular cut in the right temple region. His physician testified that the first two mentioned cuts were of a comparatively unimportant nature, but that the other was a rather deep cut. It opened up some of the deeper vessels and tore away part of the temple muscle. This torn muscle was sewed up and several stitches taken in the various cuts. At the time of the trial, which was some seven months after the injury, that portion where the temple muscle was cut was numb and respondent had not regained the use of those muscles, and thus his face was greatly affected; he still suffered some pain and headaches. The jury and trial court actually saw the condition of respondent's face and were much more capable of measuring the extent of the injury than we. The trial court must have been satisfied that the verdict was not excessive. While we feel that it was liberal, we cannot say that it was excessive. The judgment is affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and TOLMAN, JJ., concur.

[No. 15903. Department One. August 10, 1920.]

BANKERS TRUST COMPANY, *Appellant*, v. AMERICAN SURETY COMPANY, *Respondent*.¹

INSURANCE (116)—INDEMNITY INSURANCE—LIABILITY FOR LOSS—DEMAND FOR PROOFS OF LOSS—ESTOPPEL. Under a bank clerk's indemnity bond conditioned that the insured should not be liable unless the loss be disclosed during continuation of the policy or within fifteen months after termination, the insurance company is not estopped from denying liability from the fact that it asked for proofs of loss twenty-one months after cancellation of the policy, where the insured had not incurred any expense in attempting to furnish information necessary to the making of the proofs of loss, and had not been prejudiced in any way in reliance on the waiver, and the parties had simply proceeded for a few days upon the mistaken presumption that there was an existing policy.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered September 12, 1919, upon granting a nonsuit, dismissing an action on an indemnity bond, tried to the court and a jury. Affirmed.

S. Warburton (H. G. & Dix H. Rowland, of counsel), for appellant.

C. E. Dunkleberger and Bates & Peterson, for respondent.

MACKINTOSH, J.—The appellant was engaged in the banking business in Tacoma. In November, 1913, the respondent issued to it a policy covering one of its employees. This policy provided for the payment to the bank of any money which it might lose by any act of fraud or dishonesty or theft or embezzlement of the employee. The policy continued in full force until it was cancelled by agreement of both parties on February 23, 1916. The policy provided that the respondent should not be liable thereon unless "the loss be disclosed during the continuation of the suretyship . . . or within fifteen months after the termination thereof

¹Reported in 191 Pac. 845.

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and notice delivered . . . within ten days after such discovery." On the 21st of November, 1917, which, it will be noted, was practically twenty-one months after the termination of the suretyship, the appellant telegraphed the respondent's home office in New York that there was a loss under the policy. Upon receipt of this telegram, the home office telegraphed its manager in Seattle advising him that the Tacoma bank had notified the company of the loss, and telling him the company was sending him the papers, and in the meantime "to get in touch with the employer, furnish claim blanks, and advise us particulars." On the following day, November 22d, the Seattle agent wrote to the appellant as follows:

"Seattle, Wash., Nov. 22, 1917.

"Bankers Trust Company,

"Tacoma, Wash.

"Gentlemen:—My home office has advised me of your report there of a shortage in the accounts of E. J. McDonald. I am enclosing herewith claim blanks in duplicate, Form F-33, for your convenience in stating up any claim which you may have to make against this company by reason of our bond for Mr. McDonald.

"Under items of default you will please indicate the date of shortage, a description thereof and the amount, while under credit indicate what the bank may be owing Mr. McDonald, if anything.

"It is desired that you complete both of these blanks, sending one direct to the home office of the company and the other to me.

"Yours truly,

"(Signed) S. H. Melrose, Manager."

On November 24, the appellant wrote to the home office of the respondent as follows:

"Tacoma, Washington, Nov. 24, 1917.

"American Surety Co. of New York,

"New York City.

"Gentlemen:—We beg to confirm the following telegram sent to you on November 21st:

“ ‘You have loss under C Eleven Thousand Seven Evan J. McDonald Twenty-five Hundred Dollars, short in his account Bankers Trust Company Seventeen Thousand One Hundred Sixty-six and sixty-eight cents.’

“In reply to which we received from Mr. S. A. Melrose, your general manager at Seattle, under date of November 22d, a letter acknowledging receipt of our notice of claim and enclosing the necessary blanks for the purpose of submitting same in detail.

“In this connection, you are advised that two days after the shortage and the falsification of the accounts by Mr. Evan J. McDonald, we employed the firm of Price-Waterhouse & Company, certified public accounts, and they have been at work on the books for several days. As soon as the work has been completed, which will be in the course of a week or so, we will have the claim submitted to you on forms furnished by Mr. Melrose.

“Yours very truly,

“(Signed) M. M. Ogden, Cashier.”

On December 4, the respondent wrote the appellant the following letter:

“New York, Dec. 4, 1917.

“Mr. M. M. Ogden, Cashier,

“Bankers Trust Company,

“Tacoma, Washington.

“Dear Sir:—We are in receipt of your letter of the 27th ult. addressed to our manager at Seattle, Wash., Mr. S. B. Melrose, together with the enclosure therein mentioned. In reply we would respectfully call your attention to the fact that bond covering Mr. McDonald was in effect from September 1, 1913, to February 23, 1916, on which latter date it was cancelled, the liability having been taken up by the Maryland Casualty Company, as we understand it.

“Under the terms of the bond issued by this company you had fifteen months after the cancellation thereof in which to discover loss. Such fifteen month period would expire May 23, 1917. You, however, did not discover shortage until some time in November of this year, or

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about six months after our liability had expired. Under the circumstances, you will of course perceive that there is no liability on our part, and we have accordingly filed papers without taking any action therein.

"Yours truly,

"(Signed) B. J. McGinn,

"Asst. Secretary."

The respondent refused to recognize the existence of the policy or any liability thereunder, and the appellant began this action, and has brought this appeal from a judgment against it.

It is claimed in support of appellant's right of recovery that, although the policy had been cancelled in February, 1916, and by its terms the respondent was not liable for a loss which was discovered more than fifteen months thereafter, the respondent, by its conduct, had impliedly waived that provision of the policy and is estopped from now denying liability thereunder.

Many questions are presented upon this appeal, but in view of the conclusion to which we are about to arrive, it is necessary to notice but two of them.

A great deal of confusion arises in cases of this kind from the interchangeable use of the terms waiver and estoppel as though they were synonymous. There are cases of express waiver where the insurer is bound without any additional acts by either insured or insurer, and cases of implied waiver where the insurer is bound by reason of estoppel. The appellant argues that the conduct of the respondent in calling for proofs of loss and furnishing blanks on which to make claim impliedly waived the provision in the policy that it would not be liable for loss discovered after fifteen months from the termination of the policy, and argues that the respondent, having participated in the cancellation of the policy, is to be presumed to have acted

with full knowledge of the facts; and knowing that the policy had been terminated in February, 1916, and that its liability thereunder ended fifteen months from that date, must be held to have waived the benefit of the policy's provision by its conduct as shown in the correspondence; and in support of this cites a great many authorities to the effect that an insurer of any kind will be held to waive such provisions in the policy by this or similar conduct. The respondent, however, argues that, although there may be a waiver by the insurance company, such waiver is simply of defenses available upon existing policies, and that the authorities do not go to the extent of holding that an insurance company, by calling for proofs of loss, recreates an insurance policy the term of which has already expired by cancellation or otherwise. The argument is that there is a difference between a waiver that is merely the foregoing of certain rights arising from breaches of condition or warranties, or other matters which might give the insurance company a defense, and a waiver which would write an entirely new policy in the place of that which had been cancelled or had expired. In other words, that there cannot be a waiver in this case for the reason that the liability of the company had terminated by the cancellation of the policy in February.

It is not necessary to thoroughly investigate this phase of the case, and for the purpose of this opinion it may be assumed that the appellant's argument is sound and that a waiver might be made by the respondent such as would extend the operation of the provision of the policy which we have quoted, so that the company might become liable for losses which were discovered after fifteen months from the date of the cancellation of the policy. But although insurance companies may be held to have impliedly waived the pro-

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vision of the policy, the real ground upon which the liability had been impressed is that, by their conduct in waiving the provisions, they have estopped themselves from relying upon those provisions. In other words, that the basis of their liability is an estoppel and not the mere implied waiver; that, having waived the provisions, they have placed the other parties at such a disadvantage, or occasioned them such expense, that it would now be inequitable for the insurance companies to deny the waiver. We are not in this case dealing with an instance of express waiver.

As was said by the supreme court of California in *McCormick v. Orient Ins. Co.*, 86 Cal. 260, 24 Pac. 1003:

"In strictness, the term 'waiver' is used to designate the act, or the consequences of the act, of one side only, while the term 'estoppel' (*in pais*) is applicable where the conduct of one side has induced the other to take such a position that he will be injured if the first be permitted to repudiate his acts; but in the law of insurance the terms are ordinarily used indiscriminately."

"The party who pleads an estoppel must be one who in good faith has been misled to his injury." 16 Cyc. 777.

"Where the act does not result in damage or disadvantage it does not create an estoppel." *Hughes v. New York Life Ins. Co.*, 32 Wash. 1, 72 Pac. 452.

It was said in that case:

"The doctrine of estoppel is of equitable origin, and is founded upon principles of equity and justice. It is applied to conclude a party who, by his acts or admissions, has influenced the conduct of another, only when in good conscience and honest dealing he ought not to be permitted to gainsay them. When an admission is relied upon to work an estoppel, and it has been made by mistake, or without any intent to injure another, it is only in extreme cases that the law will not permit the party making the admission to show the truth. Before

that result will follow, it must appear that the admission was made under circumstances showing gross, if not culpable, negligence; and the other party must have acted thereon to his material injury. The reply of the appellant does not make a case within these principles. While she alleges she abandoned a contemplated action for a larger sum, and commenced the present one on the strength of the respondent's admission, she does not allege that her contemplated action was a valid action, nor one in which she had reasonable cause to believe that she could recover; nor does she allege that the same is not now open to her. Her only injury, therefore, has been the costs of the present action; and costs incurred in litigation are insufficient to constitute the basis of an estoppel."

In the case of *Butler v. Supreme Court of Foresters*, 53 Wash. 118, 101 Pac. 481, 26 L. R. A. (N. S.) 293, we said:

"Some definitions of estoppel are cited by the respondent, to the effect that, in the broad sense of the term, estoppel is a bar which precludes a person from denying the truth of a fact which has, in contemplation of law, become settled by the acts and proceedings of judicial or legislative officers, or by the act of the party himself, either by conventional writing or by representations, express or implied, *in pais*. And further 'because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.' But while this is true of what an estoppel is, in the abstract, the party pleading it must show that he has been injured by reason of the acts of the party which he claims to be an estoppel, by reason of having relied on the representations of the person sought to be estopped, so that his position with reference to the matter in hand has been changed to his disadvantage."

The cases relied on by the appellant to prove what it calls a waiver, but which we have indicated is properly designated as an estoppel, bear out our conclusion. In *Titus v. Glen Falls Ins. Co.*, 81 N. Y. 410, it was held that, when there was a breach of condition con-

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tained in an insurance policy, it was in the option of the insurance company to take advantage of such breach or to overlook it; that is, if it saw fit, it might waive the forfeiture, and that this waiver might take place expressly or by acts from which a waiver could be inferred, or from which a waiver would be held to follow, as a matter of law; the court saying:

“But it may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as matter of law waived.”

14 R. C. L. 1197 lays down the general rule that, when an insurance company has knowledge of acts which work a forfeiture, and yet enters into negotiations with the insured in the form of requests for proofs of loss, it thereby recognizes the continued validity of the policy and will be bound, if it has thus induced the insurer to “incur expense under the belief that the loss will be paid.”

In *Graham v. American Fire Insurance Company*, 48 S. C. 195, 26 S. E. 323, it was held that an insurance company with knowledge of facts which might forfeit the policy, having led the insured to believe it still recognized the validity of the policy by encouraging it to incur expense, would be estopped from insisting on the forfeiture. *Mutual Protective League v. Walker*, 163 Ky. 346, 173 S. W. 802, is to the same effect, as is *Western Ins. Co. v. Ashby*, 53 Ind. App. 518, 102 N. E. 45, and *Keys v. National Council, etc.*, 174 Mo. App. 671, 161 S. W. 345.

In *Cannon v. Home Ins. Co.*, 53 Wis. 585, 11 N. W. 11, the supreme court of Wisconsin said:

“ . . . that, as the defendant, in its correspondence with the attorneys of the plaintiff, after full knowledge

of the forfeiture, saw fit to call for additional proofs of loss, recognizing by this act the continued validity of the policy, it could not, after the plaintiff had gone to the expense and trouble of furnishing these proofs, change its ground and claim that the policy was no longer in force."

See, also, *Planters Mutual Ins. Co. v. Loyd*, 67 Ark. 584, 56 S. W. 44; *Pace v. American Cent. Ins. Co.*, 173 Mo. App. 485, 158 S. W. 892; *Rundell v. Anchor Fire Ins. Co.*, 128 Ia. 575, 105 N. W. 112; *Cleaver v. Traders Ins. Co.*, 71 Mich. 414, 39 N. W. 571; *Prudential Ins. Co. v. Hummer*, 36 Colo. 208, 84 Pac. 61; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472, 13 S. E. 236; *Berry v. American Cent. Ins. Co.*, 132 N. Y. 49, 30 N. E. 254; *Hatcher v. Sovereign Fire etc. Co.*, 71 Wash. 79, 127 Pac. 588.

Throughout all these cases the point is emphasized that the implied waiver must have resulted in some loss to, or expenditure by, the insured which would make it inequitable for the insurer to now deny its waiver.

It therefore becomes necessary in this case to determine whether the evidence shows anything which would operate as an estoppel against the respondent; in other words, whether, admitting that the insurance company by its conduct impliedly waived the provision of the policy in question, by that act it had caused the appellant to incur expense or suffer loss.

The evidence shows that, for some time prior to November 21, 1917, the appellant was in such financial condition that some arrangement was necessary for its relief, and that another bank in Tacoma was negotiating for the purpose of taking over its business, and in pursuance of those negotiations, the books of the appellant were being examined for the purpose of determining its financial status. The evidence also shows

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that, upon the cancellation of respondent's policy in February, 1916, another bonding company had taken the place of the respondent and had written a bond covering the same employee mentioned in the policy before us, and that the experts who were called in, and who are referred to in the appellant's letter, made the investigation for the purpose of determining the liability under this other policy, and that no investigation was made of the books of the company for the purpose of supplying the proof of loss under the policy of the respondent company, the testimony upon that point being as follows:—The witness was an expert representing the accountant company:

“Q. Have you examined the books of that date to ascertain what they were? A. As of February 21, 1916? Q. No, September 1, 1913? A. No. Q. Your examination began along in February, 1916? A. Yes, sir. Q. February 21st and continued on down? A. Yes, sir, periodically, yes. Q. You did not examine preceding that date? A. No.”

From this it will be seen that there was no proof that, relying upon the waiver of the respondent, the appellant proceeded to furnish the information necessary to make the proof of loss by incurring any expense, and that nothing has been done which places the appellant in a more disadvantageous position than it would have occupied had there been no purported waiver, and that appellant had foregone no valuable right or changed its position to its prejudice in reliance upon the acts of the respondent. The evidence merely establishes that, under a mutual mistake, the two parties, for a few days, have proceeded upon the presumption that there was an existing policy, and that no act of the respondent led the appellant to do anything which added to its expense or inconvenience.

“Ordinarily a waiver is an intentional release of some right, and it is generally held that provisions of

this character in insurance policies are deemed to be waived only when an intention to waive is apparent, or where the conduct of the company is inconsistent with an intention to declare a forfeiture, or has placed the other party at a disadvantage, or gained for itself an advantage which it should not in justice and good conscience be permitted to assert." *Elhart v. Pacific Mutual Life Ins. Co.*, 47 Wash. 659, 92 Pac. 419.

"While the later decisions all hold that such waiver need not be based upon a technical estoppel, in all the cases where this question is presented, where there has been no express waiver, the fact is recognized that there exists the elements of an estoppel." *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 560, 29 N. E. 991.

See, also, *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108; *Goodwin v. Massachusetts etc. Ins. Co.*, 73 N. Y. 480; *Prentice v. Knickerbocker Life Ins. Co.*, 77 N. Y. 483.

"Where the facts are equally known to both parties, there can be no estoppel." *Knights and Ladies of Columbia etc. v. Shoaf*, 166 Ind. 367, 77 N. E. 738.

"The whole doctrine depends on estoppel, and the essential feature of it is loss or injury to the other party by the act of the party to be estopped. In this respect there is nothing peculiar about actions upon insurance policies. They stand upon the same footing as other litigation.' Waiver is essentially a matter of intention, and to establish it there must be some declaration or act from which the insured might reasonably infer that the insurer did not mean to insist upon a right which, because of a change of position induced thereby, it would be inequitable to enforce." *Freedman v. Providence Washington Ins. Co.*, 175 Pa. 350, 34 Atl. 730.

"It is admitted that 'both parties acted in good faith up to the commencement of the suit.' It is to be observed that there is no question of any conduct of the defendant which induced the plaintiffs to omit anything essential, or to do anything prejudicial, to the validity of the policy, either before or after the

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loss. . . . An essential element of estoppel of this character is that one party should have relied upon the conduct of the other, and been induced by it to put himself in such a position that he would be injured if the other should be allowed to repudiate his action." *McCormick v. Orient Ins. Co., supra.*

There being no evidence upon which an estoppel can be predicated, the trial court was correct in dismissing the case, and its judgment is hereby affirmed.

HOLCOMB, C. J., MAIN, MITCHELL, and TOLMAN, JJ., concur.

[No. 15773. Department Two. August 11, 1920.]

S. G. DULEY, *Appellant*, v. M. W. DULEY, *Respondent*.¹

PARTNERSHIP (92)—RECEIVERS—GROUNDS FOR APPOINTMENT. The court will appoint a receiver for partnership property where an action for dissolution has been commenced, and the evidence shows a lack of harmony between the parties and that plaintiff, who had possession of the property, had converted portions thereof to his own use and was disposed to dissipate the property, and had advised creditors to bring actions to enforce collection of their claims.

Appeal from an order of the superior court for Okanogan county, Neal, J., entered July 26, 1919, appointing a receiver for a partnership, after a hearing before the court. Affirmed.

Wm. O'Connor, for appellant.

P. D. Smith and *W. C. Brown*, for respondent.

MOUNT, J.—This appeal is from an order of the lower court appointing a receiver over partnership property. The parties are brothers. The plaintiff brought an action against the defendant, alleging a

¹Reported in 191 Pac. 828.

partnership in certain farm property in Okanogan county; that defendant had sold and converted certain of the partnership property to his own use and refused to account therefor, and prayed for the dissolution of the partnership and an accounting. The defendant, for answer, alleged a copartnership different from that alleged in the complaint, and also alleged that the plaintiff had converted partnership funds to his own use and refused to account therefor, and also that there were debts past due and creditors were threatening suit, and prayed for dissolution and an accounting and for a receiver to take charge of the property. After the answer was filed, a show cause order was issued, directed to the plaintiff to show cause at a certain time why a receiver should not be appointed. Upon a hearing upon this show cause order, the court appointed a receiver. The plaintiff has appealed from that order.

At the hearing upon this show cause order, it appeared that the parties could not do business with each other. Each accused the other of converting the partnership property to his own use. It also appeared that there were secured debts amounting to some \$10,800, and unsecured debts amounting to \$700 or \$800, all past due, and that the appellant had advised the creditors that they would have to sue in order to collect their claims; that appellant had collected \$1,100 after the action was brought, and converted the same to his own use for the purpose of prosecuting this action; that all the property, which was in possession of the appellant, is liable to be lost if creditors should bring suit to collect their claims.

In *Martin v. Wilson*, 84 Wash. 625, 147 Pac. 404, we said:

“The rule is well established that where a partnership has been dissolved, or a suit for dissolution and

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an accounting is pending and there is a serious lack of understanding and harmony between partners, and one partner is excluded from any voice in the management and control of the affairs of the partnership, a receiver will be appointed. *Cole v. Price*, 22 Wash. 18, 60 Pac. 153; *Redding v. Anderson*, 37 Wash. 209, 79 Pac. 628; 30 Cyc. 726 *et seq.* The rule may be epitomized: if the parties to a partnership will not trust each other, equity will not trust either of them to settle an affair in which each of them, but for their differences, would be entitled to share in equal degree."

Here there is not only shown a serious lack of harmony between the parties and control of the property in the appellant, but also a disposition on the part of the appellant to dissipate the property and advise creditors to bring actions to enforce collections of their claims. We are satisfied that the trial court was justified in appointing a receiver under the facts stated.

The order appealed from is therefore affirmed.

HOLCOMB, C. J., BRIDGES, TOLMAN, and FULLERTON, JJ., concur.

[No. 15866. Department Two. August 11, 1920.]

LINCOLN COUNTY STATE BANK, *Respondent*, v.

H. N. MARTIN *et al.*, *Appellants*, FLOYD G.

CULVER *et al.*, *Defendants*.¹

MORTGAGES (116)—SATISFACTION—PAYMENT OF DEBT. Mortgage notes that were assigned to a bank as collateral security for the payee's debt to the bank, and thereafter assumed by the purchaser of the mortgage security, are not paid and satisfied until payment of the bank debt for which they were held as collateral, notwithstanding both the original payee and maker were discharged by the transaction.

PLEDGES (15)—ACTION TO ENFORCE RIGHT OF ACTION PLEDGED. Where mortgage notes are assigned to a bank as collateral security for a note due the bank, the bank may maintain an action to foreclose the mortgage for the amount due on the bank note.

MORTGAGES (67)—CONSTRUCTION AND OPERATION—RECORD OF MORTGAGE AS NOTICE. A married woman, taking a deed of property covered by a duly recorded mortgage, is bound to take notice of the mortgage and takes subject thereto, even if she had no actual notice and took the property as her separate estate.

SAME (120)—PAYMENT—CHANGE IN FORM OF DEBT. The fact that notes were secured by mortgage collateral and superseded by renewal notes would not change the form of the debt or affect the security.

Appeal from a judgment of the superior court for Lincoln county, Truax, J., entered November 21, 1919, in favor of the plaintiff, in an action to foreclose a mortgage, tried to the court. Affirmed.

Mulligan & Bardsley, for appellants.

Freece & Pettijohn, for respondent.

MOUNT, J.—This action was brought to foreclose a real estate mortgage held by the plaintiff as collateral security upon a note executed by the defendant H. N. Martin. All the defendants except Martin and wife

¹Reported in 191 Pac. 815.

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defaulted. These two defendants, after a general demurrer to the complaint was denied, answered separately. They denied generally all the allegations of the complaint, and set up affirmative defenses to the effect that the mortgage debt had been paid and the mortgage was, therefore, of no force. On these issues the case was tried to the court without a jury, and resulted in a judgment and decree as prayed for in the complaint. The defendants Martin and wife have appealed.

Eighteen assignments of error are made. Most of these assignments are based upon preliminary matters and the introduction of evidence, which are not necessary to be noticed. The principal question, and the one upon which the appellants apparently rely, is that the mortgage sought to be foreclosed had been paid and was not effective as against these appellants.

The facts, as they appear from the evidence, are as follows: On September 13, 1908, the defendants Floyd G. Culver and wife purchased from the defendant C. H. Katsel a tract of land in Lincoln county. At the time of this purchase, Culver and wife executed two notes, amounting to \$3,460. One of these notes was for \$2,000 and the other for \$1,460. In order to secure the payment of these notes they executed and delivered to Mr. Katsel a mortgage upon the real estate purchased. At that time Mr. Katsel was indebted to the Lincoln County State Bank upon a note for some \$4,600. After Mr. and Mrs. Culver had executed the notes and mortgage for \$3,460 and delivered the same to Mr. Katsel, Mr. Katsel assigned the notes and mortgage to the bank as security for the payment of his note for \$4,600. In the spring of 1909, Mr. Culver informed Mr. Katsel that he was unable to make the payments and requested Mr. Katsel to take back the property and release Mr. Culver from the notes and mortgage. Mr. Katsel was unwilling to do this, but told

Mr. Culver that he would endeavor to find a purchaser for the land so that both might be satisfied. Thereupon Mr. Katsel, on April 9, 1909, entered into a contract with Mr. Martin, by the terms of which Mr. Katsel agreed to assign to Martin the Culver mortgage and to cause to be conveyed to Mr. Martin, or whomsoever he should designate, the real estate covered by the mortgage. Mr. Martin agreed to pay the bank, for application on the Katsel debt, the sum of \$3,000, and also agreed to deed to Mr. Katsel certain residence property in Davenport for the land which then stood in the name of Mr. Culver and wife. On the 13th of April, Mr. Katsel and Mr. Martin went to the respondent bank, where they explained to the cashier the agreement which they had made and desired to know of the bank if it would take Mr. Martin for the \$3,000 instead of Mr. Culver. The bank agreed to do this, and on the next day Culver and wife deeded the lands in question to A. V. Martin, the wife of H. N. Martin, the consideration named in the deed being \$10,500. This deed was not filed for record until April 15, 1909. On April 13, Mr. Martin and Mr. Katsel went to the bank and Mr. Martin executed his note for \$3,000, with the understanding that the mortgage and notes executed by Mr. Culver should stand as collateral security for the payment of his \$3,000 note. Thereafter, from time to time, Mr. Martin made payments on the \$3,000 note, and on May 16, 1916, executed a new note for \$1,900, the balance due at that time. He made no further payments after that date, and this action was brought by the bank for the balance due upon this \$1,900 note, and to foreclose the Culver mortgage held by the bank as collateral security.

As we have said before, the main contention of the appellants is that the Culver notes and mortgage given to Mr. Katsel and by Mr. Katsel deposited in the bank

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had been paid, and therefore the mortgage was of no effect at the time this action was brought. We fail to see any sound theory upon which it can be held that the Culver notes and mortgage have been paid. It is true that Mr. Katsel, the original payee of the notes, has been satisfied, and it is also true that Mr. Culver, the original maker of the notes and mortgage, has also been satisfied. But these satisfactions occur in this way. The bank became the owner and holder of the Culver notes and mortgage by assignment from Mr. Katsel, the payee. Mr. Martin, by agreement between the bank, Mr. Culver and Mr. Katsel, has assumed these notes to the extent of \$3,000. The result is that Mr. Martin has become the payor of the notes and the bank the payee. But the notes have not been paid, except to the extent that Mr. Martin has made payments on his \$3,000 note, and the notes and mortgage are held by the bank as security for the balance due upon that note. So it is apparent that the notes secured by the mortgage have not been paid and the mortgage has not been satisfied, and will not be satisfied until the Martin note, originally for \$3,000, now for \$1,900, has been paid. That the bank is authorized under these circumstances to foreclose the mortgage held by it as collateral security for the note of Mr. Martin is without question. *Hillman v. Stanley*, 56 Wash. 320, 105 Pac. 816; *Bank of Montreal v. Howard*, 44 Wash. 10, 86 Pac. 1115. Under the last case, the bank clearly had the right to foreclose the mortgage for the amount due upon the note for which the mortgage was collateral security.

It is argued by the appellants that Mrs. Martin took the property as her separate property without notice of the mortgage sought to be foreclosed in this action. The mortgage was of record and she was bound to take notice of it. She therefore took the property subject

to the mortgage, even if it might be held that the property was her separate property.

Counsel for appellants make some contention that the evidence shows that the \$3,000 note of Mr. Martin has been paid. We find no evidence in the record to justify that contention. The evidence of Mr. Martin himself as to the payment of the note is at least unsatisfactory and, we think, does not amount to a statement that the note had been actually paid. On the other hand, the testimony for the respondent clearly shows that it had not been paid, and at the time of the last payment, Mr. Martin himself had executed the renewal note. The fact that the original \$3,000 note has been renewed does not change the character of the debt. The rule is that a change in the form of a debt does not affect the security. *Straw-Ellsworth Mfg. Co. v. Cain*, 20 Wash. 351, 55 Pac. 321.

The demurrer was properly overruled. The facts contained in the statement we have made are substantially the facts alleged in the complaint and, no doubt, stated a cause of action. We find no merit in the other assignments of error and are convinced that the judgment of the lower court is correct, and it is therefore affirmed.

HOLCOMB, C. J., BRIDGES, TOLMAN, and FULLERTON, JJ., concur.

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[No. 15778. Department One. August 11, 1920.]

E. P. VAN DELINDER, *Respondent*, v. J. A. RICHMOND,
Appellant.¹

TRIAL (20)—RECEPTION OF EVIDENCE—OFFER OF PROOF. Defendant's statement as to what he intended to do with a rented house after his tenant moved out is not inconsistent with the fact that the house was rented for a year, and hence an offer to prove the same to corroborate his denial of such statement is properly overruled.

APPEAL (457)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE. In an action for breach of promise, in which plaintiff testified that the marriage was to take place after trial of a certain cause in September, it is harmless error to exclude, in denial, evidence that such cause was not then in issue, where it was not shown that plaintiff did not know the cause was not at issue.

APPEAL (123)—PRESERVATION OF GROUNDS—ADMISSION OF EVIDENCE. Error cannot be predicated upon sustaining an objection to a question put to party's own witness which did not indicate the evidence to be elicited, in the absence of an offer of what was expected to be proved.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered June 27, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action for a breach of promise. Affirmed.

Yates & Yates, McMaster, Hall & Drowley, and Miller & Wilkinson, for appellant.

H. W. Arnold and Jos. O. Blair, for respondent.

MITCHELL, J.—Plaintiff recovered a verdict and judgment for damages against the defendant, upon a breach of promise of marriage. A motion for a new trial being denied, defendant has appealed.

Appellant paid his addresses to the respondent regularly from February, 1918. They became engaged in the early summer of that year, and remained so until

¹Reported in 191 Pac. 850.

he married another woman on November 21, 1918. In detailing the attentions of appellant, and in proof of his promise of marriage, respondent and several of her witnesses testified to a conversation between a Mrs. Campbell and the appellant wherein Mrs. Campbell asked him about renting a house he owned in the city of Vancouver, and wherein he answered that, when the people moved out, he didn't intend to rent it again, he was going to fix it up, and further said "we intend to live there later," and nodded toward the respondent near by. Mrs. Campbell's version was that, upon asking him if he would rent the house, he said: "Mrs. Campbell, I don't think that I want to rent my house, there is a party living in it. If the parties move out I am going to clean the house up and she and I are going to live in it"—referring to Mrs. Van Delinder. Another witness testified similarly. In the defense, when appellant was testifying in chief, after denying having had any conversation about renting the house, a controversy arose over the propriety of certain questions relating to the testimony of respondent's witnesses and the condition of the house. Objections to the materiality and relevancy of the questions were sustained. Those rulings together constitute the first assignment of error. To make a record and protect his rights with reference thereto, appellant offered as follows:

"We offer to prove by the witness Richmond that his house in Vancouver on the corner of 18th and C streets was leased on the 9th of February, 1918, for twelve months from that date, and was not at any time during the summer of 1918 vacant or for rent, and that there was no time during 1918 after the 9th day of February, 1918, when he could have rented the house to Mrs. Campbell or anyone else."

The offer, upon objection of respondent's attorney, was refused by the court. It is argued by appellant

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that, having denied making any statements about the house, his offer was a strong showing that he could not have made use of the building in the manner in which respondent's witnesses testified that he intended to use it, and was a corroborating circumstance of his denial of those statements. Appellant's rights in this particular were limited by the contents of his offer of proof, from which it is clear there was nothing inconsistent with the statements of respondent and her witnesses upon the same subject. Besides, just prior to the offer, appellant, referring to the house, testified as follows:

"Ques. And what's the fact as to whether or not it was rented then? Arnold (attorney for respondent): Objection. Ans. It was rented for a year at that time. Ques. When did you rent it? Ans. February. Arnold: Objection. Court: Sustained. Ques. Did you have a house in Vancouver at that time you could have rented if you wanted it? Arnold: Objection. Court. He may answer. Ans. No, sir."

The assignment of error is without merit.

The next assignment of error argued is the refusal of the court to permit testimony showing that the issues had not been made up in what is referred to as the Lieser case, and that it was at no time ready for trial. During the courtship and the engagement of these parties, there was pending in the superior court of Clarke county a suit wherein Mrs. Van Delinder was plaintiff and one Lieser was defendant. In that suit she was represented by her present attorney, Mr. Arnold. At the time of their engagement, the appellant preferred an early marriage, but the respondent, for some reason not explained by the record, expressed the desire to put the wedding off until after the trial of the Lieser case, which he agreed to. The trial of that case had been put off for reasons which she said she didn't

understand and that she thought it would be heard at the September jury session. She so told the appellant. It happened that there was no jury session in September, and she mentioned it to the appellant in subsequently discussing the fixing of a date for their marriage. In his defense, appellant offered to prove by the records of the clerk's office that the Lieser case was not at issue at any of the times she claimed to have mentioned the matter to him. Upon a proper objection, the offer was refused by the trial court. The weakness of appellant's contention that the evidence offered would have a tendency to disprove her statements as to the condition of the Lieser case, and the weakness of the offer itself, is obvious in the failure to include or attribute knowledge on her part of the actual condition of the issues in that case. In the cross-examination of respondent, in passing upon an objection to a question as to the condition of that case for trial, the court had directed that she might testify as to her understanding regarding the matter, whereupon she testified:

"Ques. Now at that time you didn't understand that this (Lieser) case was even ready for trial, did you?
Ans. As far as I knew, yes. I supposed it was coming up whenever the jury was sitting, which was in July or September."

Then immediately she further testified under cross-examination that, in September, after learning there would be no jury session that month, they then agreed to get married in December. It is plain that, in her conversations with appellant concerning the trial of the Lieser case, she relied, as most litigants do, upon the advice of her lawyer; and after her disappointment at the trial not taking place in September, the parties then agreed to get married in December. The refusal of the testimony offered was without prejudicial error.

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The next assignment is "the refusal of the court to permit the defendant to testify to a conversation had between him and the respondent referring to the matters in controversy." While testifying in chief in his defense, appellant said he had received a letter from Mrs. Van Delinder's attorney, Mr. Arnold, and that he had called on him with reference to it. He was not allowed to testify to his conversation with the attorney. He afterwards spoke to respondent about the conversation he had had with her attorney. An objection to the question that he relate the conversation with her was interposed. His counsel said: "It throws light upon the relations of these parties, your Honor." The court replied: "Upon the showing that has been made at this time, the objection is sustained." The witness then answered affirmatively that the conversation had to do with his relations to the respondent and would throw light upon those relations. On motion the answer was stricken. Then the witness was asked: "I will repeat again, did you or will you tell the conversation, after having asked the previous questions." An objection, as being immaterial and irrelevant, was sustained. The witness then testified that the conversation referred to with the respondent occurred in the spring or early summer of 1918. That ended the inquiry upon this particular point. The trial court was left in the dark as to the materiality of the evidence, and so are we. Respondent, or any of her witnesses, had not testified to any such conversation; neither had she, or any of her witnesses, or the appellant himself, testified to any business or trouble between her and the appellant wherein she was represented by Mr. Arnold, or any other attorney, prior to appellant's marriage in November. In the instance of the present assignment of error a noticeable departure is observed in the procedure adopted by appellant from that as to the two first assignments, .

viz., in this one there was no offer of proof. In such cases, that is, where the question itself does not indicate clearly the evidence to be elicited, or by its terms refer to evidence submitted by an adversary, the rule is that a question addressed to a party's own witness—in this case the party himself—if objected to, must be followed by an offer of what is expected to be proved by the answer, if it is desired to complain of a ruling sustaining the objection and excluding an answer. *Gaffield v. Scott*, 33 Ill. App. 317; *Nonotuck Silk Co. v. Levy*, 75 Ill. App. 55; *State ex rel. Repp v. Cox*, 155 Ind. 593, 58 N. E. 849; *Boisvert v. Ward*, 199 Mass. 594, 85 N. E. 849; *McCormick v. St. Louis*, 166 Mo. 315, 65 S. W. 1038; *Herzig v. Sandberg*, 54 Mont. 538, 172 Pac. 132; *Juby v. Craddock*, 56 Mont. 556, 185 Pac. 771; *Riley v. Missouri Pac. R. Co.*, 69 Neb. 82, 95 N. W. 20; *Farmers & Merchants Ins. Co. v. Dqbney*, 62 Neb. 213, 86 N. W. 1070; *Green v. Tierney*, 62 Neb. 561, 87 N. W. 331; *Madson v. Rutten*, 16 N. D. 281, 113 N. W. 872; *Ashmun v. Nichols*, 92 Ore. 223, 178 Pac. 234, 180 Pac. 510; *Mullin v. Flanders*, 73 Vt. 95, 50 Atl. 813; 38 Cyc. 1329, par. b.

Lastly, it is contended there was misconduct of the judge at the trial of the case. From the abstract, the statement of facts, including the affidavits used on the motion for a new trial, the briefs and arguments of counsel, we are satisfied this contention is also without merit.

Affirmed.

HOLCOMB, C. J., PARKER, MAIN, and BRIDGES, JJ.,
concur.

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Opinion Per MITCHELL, J.

[No. 15865. Department One. August 11, 1920.]

In the Matter of the Estate of JOSEPH UTTERS.

ANNA MARSHALL, *Appellant*, v. F. L. PRESCOTT,
Administrator etc., Respondent.¹

EXECUTORS AND ADMINISTRATORS (4)—APPOINTMENT—RIGHT TO LETTERS—NONRESIDENT HEIRS—JURISDICTION. The court has jurisdiction to appoint an administrator within forty days after the death of the decedent, where the petition was in proper form and contained all the essentials necessary to give the court jurisdiction under the probate code, Laws of 1917, p. 657, § 62, and there was no surviving wife nor any heirs living within the state and eligible to appointment under Id., p. 663, § 87.

SAME (12)—APPOINTMENT—PREFERRED CLASSES—NOMINEES BY NEXT OF KIN. The right granted to the next of kin by the probate code, Laws of 1917, p. 656, § 61, subd. 2, is a preference right to appointment as administrator only, and no right is given to nominate another for appointment, such right being given only to the surviving spouse, under Id., subd. 1.

Appeal from an order of the superior court for Spokane county, Huneke, J., entered March 13, 1920, upon findings in favor of the defendant, after a hearing before the court upon conflicting petitions for the appointment of an administrator. Affirmed.

King & Kerr, for appellant.

F. A. McMaster, for respondent.

MITCHELL, J.—An appeal has been taken from an order disposing of conflicting petitions for the appointment of an administrator of the estate of Joseph Uppers, deceased. A duly verified petition was filed in the superior court of Spokane county, wherein it was alleged that Joseph Uppers died intestate on February 17, 1920, in and a resident of Spokane county, leaving estate in that county; that the next of kin and heir

¹Reported in 191 Pac. 836.

at law of the deceased was a sister, —— Marschall, residing in New York; that the petitioner was one of the principal creditors of the deceased, and that the deceased left surviving him no wife or children living within this state. The petition asked for the appointment of F. L. Prescott, of Spokane, as administrator, and that notice of the petition and hearing thereon be given as required by law. Proper notice of hearing the petition was given. Another creditor, by petition, joined in the application for the appointment of F. L. Prescott, who also filed a petition for the appointment of himself as administrator.

Some days later a petition for the appointment of another party, a resident of Spokane, was filed by Anna Marschall, wherein, objecting to the appointment of Prescott, she alleged, among other things, that she was a resident of New York, a sister of the deceased, and that the only other heirs at law of the deceased were certain sisters, nephews and nieces residing in Germany. Other and formal written objections to the appointment of Prescott were filed by her and also by her attorneys, alleging that she had a preference right of appointment which she exercised by her application for the appointment of the party designated in her petition; that forty days had not elapsed after the death of the decedent when the creditor's petition was filed; that the so-called creditor was not a creditor within the terms of the applicable statute, nor entitled to nominate an administrator; and that said Prescott is not a fit and suitable person to act as such administrator.

Later the cause came on for hearing with all the parties present. Renewed objections to the consideration of all the petitions, other than that of Anna Marschall, were overruled and testimony taken. The court entered findings, among other things, to the effect

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that the decedent died in, and a resident of, Spokane county on February 17, 1920, leaving estate therein consisting of real and personal property; that, at the time of his death, he was a bachelor, and no father or mother survived him; that he had no brother or sister, or survivor of such, living within the state; that said F. L. Prescott is a resident of Spokane, and for twenty years immediately preceding the death of said Uppers had full charge of and managed the estate and property of Joseph Uppers as if it was his own, at the request of said Uppers, rendering regularly quarterly statements of his services, to the satisfaction of said Uppers; and that said Prescott is a proper and suitable person to act as administrator; that the next of kin and only heirs at law of the deceased are Anna Marschall, a sister, of New York city, one nephew residing in New York city, and certain other named sisters, nieces and nephews residing in Germany. The court also found that the party suggested for appointment in the petition of Anna Marschall was a resident of Spokane and a proper and suitable party to be appointed administrator. The court concluded to appoint F. L. Prescott, and entered a judgment and order upon the findings and conclusion and appointed him as administrator of the estate. All of the proceedings, including the order, were had and made within forty days after the death of Joseph Uppers.

Upon her appeal, Anna Marschall contends that the court was without jurisdiction to entertain the petition for the appointment of Prescott within forty days after the death of the decedent. But we are of the opinion the contention cannot be maintained. The first petition filed was in the form prescribed and contained all the essentials necessary to give the court jurisdiction by the terms of § 62, ch. 156, p. 657, Laws of 1917, known as the probate code; and when it appeared, as it did

by the petitions, including the one filed by the appellant, that there was no surviving wife, nor any heir at law eligible to appointment under § 87 of the probate code (Laws of 1917, p. 663), since all of them were nonresidents of the state, a situation was presented that obviated any necessity for a delay of forty days in proceeding to exercise jurisdiction by the appointment of an administrator.

It is further contended that "appellant, having nominated, within forty days, a suitable and competent person as administrator, it was the duty of the court to appoint such nominee". The order of preference in the appointment of an administrator is designated in § 61 of the probate code, Laws of 1917, p. 656. So far as it is material here, it provides:

"(1) The surviving husband or wife, or such person as he or she may request to have appointed.

"(2) The next of kin in the following order: 1, child or children; 2, father or mother; 3, brothers or sisters; 4, grandchildren."

It is to be observed that subd. 1 gives to a surviving husband or wife the right to nominate another for appointment by the court, while subd. 2 is silent upon the subject of any such right on the part of the next of kin. The right accorded the next of kin is a preference to appointment only, in the order named; all of whom are preferred over persons described in subsequent subdivisions of the section; provided, of course, such next of kin are not nonresidents of the state, for in such case they are not qualified, under § 87 of the probate code. A suggestion made by the next of kin of a fit and suitable person for appointment as administrator, while fraught with considerable persuasion, is not controlling in shaping the discretion and judgment of the court making the appointment. In this case there was abundant and convincing evidence to support the selec-

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tion of F. L. Prescott to act as administrator. The judgment to that effect, from which the appeal has been taken, will not be disturbed.

Affirmed.

HOLCOMB, C. J., PARKER, MAIN, and MACKINTOSH, J.J.,
CONCUR.

[No. 15585. Department Two. August 13, 1920.]

THE STATE OF WASHINGTON, *Respondent*, v.
J. E. COLLINS, *Appellant*.¹

ASSAULT (8)—OFFENSES—COMPLAINT—SUFFICIENCY. A complaint in justice court charging that the defendant in a quarrel "did strike G. V. with his hand" is insufficient to sustain a conviction of assault.

CRIMINAL LAW (45, 50)—FORMER JEOPARDY—INSUFFICIENT CHARGE. Where defendant pleaded guilty and was convicted under a complaint insufficient to charge an offense, he cannot interpose the plea of former jeopardy (HOLCOMB, C. J., and BRIDGES, J., dissenting).

SAME (45, 50)—FORMER JEOPARDY—CONVICTION IN JUSTICE COURT—PROCEEDINGS—STATUTES. The plea of former jeopardy cannot be interposed by a defendant convicted in a justice court upon his plea of guilty to the charge of assault, where the justice failed to comply with Rem. Code, §§ 1930, 1931, which provide that the justice shall summon the injured person and enforce his attendance at the trial if necessary, and shall not assess a fine or enter a judgment until a witness has been examined to state the circumstances of the transaction.

Appeal from a judgment of the superior court for Stevens county, Jackson, J., entered December 6, 1916, upon a trial and conviction of assault. Affirmed.

John Salisbury, for appellant.

L. B. Donley, for respondent.

FULLERTON, J.—The defendant, J. E. Collins, was convicted in the superior court of Stevens county of

¹Reported in 191 Pac. 831.

the crime of assault in the second degree, and appeals from the judgment pronounced against him.

The assault for which the defendant was convicted was committed upon the person of one George Vath, Sr., on July 2, 1915. Shortly after the assault, the defendant was taken into custody by one H. R. Pope, whose legal capacity to make arrests does not appear, and was brought before the justice of the peace of Loon Lake precinct of the county named, where a written complaint was made by the person having the defendant in custody, purporting to charge the defendant with the crime of assault. The defendant was immediately put upon trial and, according to the justice's record, "pleaded guilty to having struck George Vath, Sr., with his hand," whereupon the justice found the act illegal and against the peace and dignity of the state of Washington, and assessed a fine against him of one dollar, together with the costs of the prosecution, the whole amounting to two dollars and twenty-five cents. The defendant paid the fine and was discharged from custody.

Afterwards, and on the same day, the defendant was arrested on a warrant issued by a justice of the peace of another precinct in the same county, charging him with an assault in the third degree, committed on the person of George Vath, Sr. Of this offense he was convicted by the justice, and sentenced to pay a fine of one hundred dollars, together with the costs of the prosecution. From the judgment of conviction, he appealed to the superior court. When the record reached that court, the prosecuting attorney filed an information against him, based upon the justice's record, charging him with an assault in the second degree. To the information the defendant interposed a plea of former conviction of the same offense, and

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sought to sustain the plea by offering the record of the justice of the peace before whom the first of the proceedings were had. This proffered evidence the trial court rejected, and its rejection constitutes the error relied upon for reversal on the appeal now before us.

We think the ruling of the trial court right for at least two reasons. First, the complaint on which the conviction was had before the justice of the peace did not state an offense. It merely charged that, in a quarrel between the defendant and George Vath, Sr., the defendant "did strike George Vath, Sr., with his hand," all of which could be true and still no offense be committed under the statutes defining the offense of assault. In the absence of a statute to the contrary, there can be no lawful conviction or acquittal upon an information, indictment or complaint which is insufficient to state an offense, and hence no plea of former jeopardy thereon. *State v. George*, 84 Wash. 113, 146 Pac. 378. The cited case also holds that we are without such a statute. Second, the proceedings before the justice were contrary to the plain mandate of the statutes governing the proceedings in such cases. These statutes, while providing that a defendant may plead guilty to any offense charged against him (Rem. Code, § 1929), also provide that, in all cases where the offense charged involves an injury to a particular person who is within the county, it shall be the duty of the justice of the peace to summon the injured person and enforce his attendance at the trial, if necessary; and further, that no justice shall assess a fine, or enter a judgment, until a witness or witnesses have been examined to state the circumstances of the transaction. (*Id.*, §§ 1930, 1931.) These statutes were ignored by the justice of the peace in this instance. The

injured party was not summoned, although he was within the county, and it does not appear that any witness was sworn and examined, much less any witness who stated the circumstances of the transaction. The statutes have a purpose. They were intended to prevent the very thing that evidently occurred in the justice's court; the imposition of a nominal or an inadequate punishment for a grievous offense.

The justice's proceedings, therefore, failed to show a legal conviction of the defendant, and hence there was no error in rejecting as evidence the record showing such proceedings.

The judgment is affirmed.

MOUNT and TOLMAN, JJ., concur.

HOLCOMB, C. J. (concurring)—I concur in the result, for the second reason stated; disagreeing with the first.

BRIDGES, J. (dissenting)—I am unable to concur in that portion of the opinion of the court which holds that appellant cannot successfully raise the question of former jeopardy simply because the complaint, technically read, failed to charge him with a crime. Here we have a man arrested upon a criminal complaint, tried, found guilty, fined, and the fine paid. Later, he is charged by information with the very crime of which he was convicted, and the judgment of which he has paid, and he is not permitted to plead former jeopardy because the complaint upon which he was found guilty was insufficient to state a crime according to the rules of law.

This does not seem to me to be right or fair. Under that theory, one pays the penalty of a crime because he is unable to foresee that the courts will later hold that he was not legally convicted. If this rule is applicable to misdemeanors, it is likewise applicable to

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more serious offenses, and thus it might be that one would be required to serve two terms in the penitentiary for one offense. As I read the case of *State v. George*, 84 Wash. 113, 146 Pac. 378, upon which the court's opinion is largely based, it is not applicable to the facts of this case. It would be in point if the appellant had appealed from the judgment of conviction imposed upon him, was thereafter indicted for the the complaint insufficient. In that case the defendant was convicted; he appealed to this court, and we held that the complaint did not state facts sufficient to constitute a crime and we ordered the case dismissed. He was later arrested and put to trial on a sufficient information. At that trial he entered a plea of former conviction, which was denied. Upon appeal we upheld that ruling. It seems to me that there is a vast distinction between that case and this one. Here the state, having caused the appellant's arrest and conviction, and having caused sentence to be imposed upon him and required him to discharge the same, it is in no position to say that the whole proceeding amounted to nothing simply because the complaint, under which he was convicted, did not legally charge a crime. In the case of *Commonwealth v. Loud*, 3 Metc. (Mass.) 328, 37 Am. Dec. 139, the facts were that the defendant, who was convicted in the court of the justice of the peace, and who paid the fine there imposed upon him, was thereafter indicted for the same offense, and on trial, under the indictment, offered to prove the record and proceedings of his prior conviction before the justice of the peace as a bar, which offer was denied him. I cannot do better, nor as well, than to give my ideas in the language of the court in that case:

"But in the case at bar, the defendant waived any exception to the judgment, complaint, proceedings, or

sentence; and he has performed the sentence. The commonwealth now desire to have those proceedings held for nothing, so that, by an indictment in technical and legal form, the defendant may be again tried and punished for the same offense of which he has been informally convicted. We cannot think those proceedings before the magistrate were merely void. On the contrary, it is reasonable to believe, that the complainant intended to prosecute for a larceny. The defendant understood it so, and so did the magistrate. Now the judgment that the defendant was guilty, although upon proceedings which were erroneous, is good until the same be reversed. This rule of criminal law is well settled. . . . But he might well waive the error and submit to and perform the judgment and sentence, without danger of being subjected to another conviction and punishment for the same offense."

See, also, *Commonwealth v. Keith*, 8 Metc. (Mass.) 531, 8 R. C. L. 140.

I therefore dissent.

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[No. 15681. *En Banc*. August 13, 1920.]

F. V. HURLEY *et al.*, *Appellants*, v. LIBERTY LAKE
COMPANY, *Respondent*.¹

DEEDS (37)—PROPERTY CONVEYED—APPURTENANCES. Sewage and water systems composed of springs, pumps, tanks, etc., attached to land belonging to a land company are not "appurtenances" within the meaning of deeds of conveyance of lots sold by the company; since real property cannot be appurtenant to real property.

SAME. The free use of sewage and water systems was not intended to pass as an "appurtenance" to lots sold by a land company, where it appears that there was no representation to that effect in advertising circulars used in a vigorous selling campaign holding out alluring inducements to prospective purchasers, and no claim of oral representations to that effect by agents, or any assertion of the right by purchasers for a period of ten years.

WATERS AND WATER COURSES (65)—CONVEYANCES—RIGHTS APPURTENANT TO OTHER ESTATE. Purchasers of lots supplied by a water system installed by the vendor and necessary to the enjoyment of the property cannot claim a free right to the continual flow of the water through the servient premises as an appurtenance, where a greater part of the system did not exist at the time of the conveyances, and the water did not run freely and without control, since the vendor had placed shut-offs at the property lines, thereby expressing its control and ownership in the water.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 15, 1919, in favor of the defendant, dismissing an action by property owners to determine rights in and to the use of certain water systems, tried to the court. Affirmed.

Burcham & Blair, for appellants.

Merritt, Lantry & Merritt, and *Voorhees & Canfield*, for respondent.

MACKINTOSH, J.—Liberty Lake is situated about twelve miles from the city of Spokane and is connected therewith by an electric car line. In 1907, the

¹Reported in 192 Pac. 4.

respondent's predecessor in interest owned land on the shore of the lake which it platted into lots and streets. The lots were then offered for sale, to be used exclusively for residential purposes. The plan was to make the property an attractive place for summer homes, and contemplated graded streets, electric lights, water and sewer systems. A spring water system was installed, the water flowing by gravity, but later on it was discovered that this supply was not adequate for all purposes and a lake water system was introduced, the water being delivered by pumps, and, at about the same time, the sewer system was built. These three systems cost from \$40,000 to \$50,000, and were all completed in 1910. More than one-half of the platted lots were sold, and the appellants are the owners of nearly all of them, and made their purchases between the years 1907 and 1910, and at the time of the purchase by most of the appellants, the spring water system was the only system installed. After 1910, there were very few sales of Liberty Lake property.

The deeds of conveyance are uniform, and in each of them the property is described according to the plat and contained this provision, "to have and to hold, together with all the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, to the said party of the second part, his heirs and assigns forever." The appellants went into possession, built residences and improved their properties, which have been used during the summer season at all times since.

After the lake water system was installed, the spring water system was used for only drinking or cooking purposes. These three systems were constructed by laying mains along the streets, with laterals to the lots, paid for by the respondent, and from the lot lines the piping and plumbing were installed at the expense of

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the lot owners. The deeds required the lot owner to connect with the sewer when completed, but nowhere in the deed was any provision made for the use by the lot owner of either water system. At the lot lines "shut-offs" and "wastes" were installed by the respondent. During the years in which improvements were being made, no charge was made for water, but upon the completion of the three systems late in 1910, the respondent gave notice that it would make such a charge. Thereafter, and from that time until 1913, inclusive, there was a charge made against each user for the use of both spring and lake water.

Prior to the commencement of the summer season of 1914, on account of financial difficulties in which the respondent was involved (we are using the word respondent to cover the present respondent and its predecessors in interest), the lot owners operated the three systems and divided the cost of operation ratably among themselves. In 1915, the respondent established a season rate for that year and continued the same for three years thereafter.

From 1915 to 1918, there were many conferences between the respondent and the lot owners concerning the respective rights and obligations in regard to the three systems, and in 1919 the lot owners were notified that, commencing that season, they would be required to pay water rates greatly in excess of what they had theretofore been paying. This water rate included cost of maintenance and operation and took into consideration interest on the investment. When notice was received by the lot owners of this raise of rates, this action was instituted, in which the lot owners are seeking to have determined their rights in and to the use of the three systems, and, according to the prayer of their complaint, they are claiming to be the owners

of the three systems, but, as we understand the brief and argument of their counsel, they have now abandoned that position and are now only claiming that they have the right to the use of those systems in the supplying of water without cost, and have abandoned the contention that they are the owners of the pipes, pumps and real estate upon which the systems are located, together with the tanks, pump houses and machinery. They now contend they are entitled to have a decree that, by and upon the purchase of their respective lots, and in consideration of the original purchase price paid, they have received, as appurtenant to their lots, the right to use the three systems, including the necessary water, but are willing to pay for the actual cost of repairs and operation of the systems.

The respondent admits the right of the lot owners to the use of the systems, but claims that it has a right to charge for the water and service a fair and reasonable amount, which is to be determined as are rates charged by corporations engaged in similar public services.

Upon the trial, judgment was entered that the action be dismissed. From this the lot owners have appealed.

The foregoing is a fair statement of the position of the parties, although the pleadings and proof and briefs have taken a great deal wider range, so that the question which we have to decide is not nearly so complicated as the extremely voluminous record and briefs might suggest by their inspection. The lot owners are not seeking to have any rate established for the use or service of the three systems, nor does the respondent deny that the lot owners are entitled to the services afforded by the systems. The question, in its final analysis, then is, Has respondent, for considerations already paid it by appellants in the pur-

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chase price of their lots, disposed of its supply of water and its water and sewer systems?

The first matter for consideration is whether the court can enter into a consideration of the question at all, for the reason that the deeds do not mention these systems, and it is claimed by respondents that evidence is inadmissible to vary the terms of the deeds. The lot owners assert that the deeds conveyed the appurtenances, and that extrinsic evidence is admissible for the purpose of determining what was included within that term. As we view the situation, it is unnecessary to pass upon this contention, and we are, for the purposes of this case, willing to assume that evidence is properly admissible for the purpose of explaining the situation at the time the lots were purchased, in order to determine what was included within the expression "appurtenances." That the three systems (speaking of them as they are composed of springs and houses, pumps, piping, septic tanks, etc., attached to the property owned by the respondent) cannot by parol evidence be made appurtenances is sufficiently obvious, for real property cannot be appurtenant to real property.

We will, then, examine the testimony as it was introduced tending to establish that the free use of the systems and the free use of the water were the appurtenances referred to in the conveyances. A great mass of documentary evidence was introduced, consisting of advertising, circulars, prospectii, put out by the respondent in its sales campaign of 1907 and two or three years succeeding. Nowhere in any of this written evidence is there any mention made of free water or the free use of any water or sewer system. The strongest statement in this regard is that the purchasers of property at Liberty Lake will have the use

of streets, sidewalks and public utilities without assessment, and so they have had. The term "assessment" is one in ordinary use and carried to the persons to whose attention it was directed, who were residents of Spokane, its ordinary meaning. They are presumed to be familiar with what assessments for public utilities mean. The common experience of city dwellers, and especially those owning city property, should convey to them, upon reading the statement that there will be no assessments, the meaning that there will be no special assessments levied against the property for the purpose of making the improvements and installing the utilities. If it had been the intention of the respondent to furnish free water or to include in the sales an interest in the spring water system then installed, or the other systems which thereafter were installed, certainly, in as vigorous a campaign as it was making for the purpose of procuring purchasers, it would have mentioned that very extraordinary and alluring inducement to prospective buyers. Taking into consideration the thorough cultivation that the respondent made of its field of operations, it is remarkable, if it was its intention to include with each lot sold the rights which the appellants are now claiming, that some mention was not made, in all of the dozens of printed documents that it issued, of this attractive feature of the proposition which they were pushing.

Oral evidence was introduced, however, from many witnesses among the appellants, who testified that different sales agents and officers of the respondent, in promoting and negotiating sales to them, referred to and promised the free use of the utilities and the free use of the water. The trial court who heard this testimony was not impressed thereby, nor are we, for the

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reason that it dealt with statements made some ten years or more prior to the time of trial, and was, therefore, dependent upon human recollection, which is often frail, and especially so when assisted more or less by personal interest. It would be very strange if oral statements such as this were made by the company's officers at the time of sale that no vestige of any such intention was indicated in its written or printed advertisements. Moreover, cross-examination of many of these witnesses weakens the effect of their direct testimony, and leaves the impression that, at most, what the respondent did was to advert to the fact that it had graded the streets, put in a water system, and that the purchasers would not be called upon to pay for those things which one purchasing bare, unplatted property usually has to pay for. The testimony shows appellants are business men, and if they were receiving, at the time of their purchases, the right to use the water and sewer systems and the right to have them operated free of charge, it occurs to us that some one of them, at least, would have had an expression made of such conveyance in the deed which he received, but nowhere is there any intimation that the perpetual free use of the utilities was intended to be conveyed.

Some of the witnesses testified that they were told that, when all of the lots were sold, the water service would be turned over to the lot purchasers free. This testimony was flatly contradicted by the respondent's witnesses, and, moreover, was not properly admissible, in that it was, if true, an effort to have imposed as appurtenant to appellants' lots the physical systems themselves, a position which the appellants have now abandoned, and which, in any event, is untenable for the reason that the systems embraced the springs and

the lands upon which septic tanks, etc., were situated, which were real property and could not be appurtenant.

If parol testimony may be introduced to explain an ambiguity which the appellants claim was presented by the use of the word "appurtenant" (*Norton v. State*, 104 Wash. 248, 176 Pac. 347; *Wright v. Seattle Grocery Co.*, 105 Wash. 383, 177 Pac. 818; *Reed v. Insurance Co.*, 95 U. S. 23; *Ganson v. Madigan*, 15 Wis. 158; *Fayter v. North*, 30 Utah 156, 83 Pac. 742; *Wade v. Dorius*, 52 Utah 310, 173 Pac. 564), such evidence cannot make an appurtenance out of real property.

Moreover, in an interpretation of the word "appurtenant," it must be borne in mind that the situation at the time of the conveyances must be considered, for a deed of property with its appurtenances conveys only what is appurtenant at the time of the conveyance, and, as we have noted, nearly all of appellants' lots were conveyed prior to the installation of the sewer and lake water systems, and they surely could not have been included within the term "appurtenant," as they were not then appurtenant, not being in existence. But appellants say that the deeds referred to connections with the sewer system in contemplation, but we cannot see how this would alter the universal rule that, in order for an easement to be appurtenant to real property, it must be in existence at the time the real property is conveyed.

Adverting once more to the testimony in the case, it shows that for years the appellants have never asserted the right which they now claim; that they have paid, probably in the same manner in which every one pays for such services, the charges that have been made by the respondent, and only asserted a right to the free use of the services when the charges became

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exceedingly exorbitant. Moreover, as a matter of some weight, it is to be noted that the respondent, in installing its water systems, indicated by the putting in of shut-offs, etc., that it intended to assert a right over the water flowing through its pipes and its ownership thereof.

The appellants contend that the general rule of water courses applies in this case, and that, where an artificial water course runs from one tenement to another and supplies the latter with water, and the latter is sold, there passes to the purchaser the right to have the water flow in the accustomed manner through the servient premises; but in this case, as we have already stated, the lake water system did not exist at the time of the conveyances, and as was said by the trial court:

“If I have a number of lots and a pipe line carrying flowing water freely, to every lot by gravity flow and without any effort or control on my part, a conveyance of any lot would carry with it the right to the continual flow of the water in the pipe, as an appurtenance. That is very much the condition here so far as the spring water is concerned with this important difference; at every lot line the company, when it installed the system, placed a shut-off by means of which it could and did shut off or turn on the water. The water did not run freely and without control but the company, by placing this device in the pipe, expressed its control over and ownership in the water. Therefore, while it serves the lot, while it is necessary to the convenient use and enjoyment of the lot, yet it is not free to go with the lot, for it is owned and confined and controlled by the company—to flow it if it wills and to cease flowing when it desires.”

Holding, as we do, that there was no conveyance of these systems or the water by the deeds, those cases cited by the appellants in support of their contention that the respondent is not a public service corporation and that there is merely a matter of contractual rights

involved, become irrelevant. The conduct of the respondent which has given rise to this action is one which does not leave the appellants without relief, as, under the law, the public service commission may investigate the situation and establish such rates as are equitable and just, and if its decision is not satisfactory, there is provision made for its review. But because the respondent has promulgated a rate card which calls for payments apparently unfair, does not present a reason why the lot owners should be decreed to be the owners of the respondent's property.

Under neither the facts nor the law can we come to the conclusion that the lot owners are entitled to more than to receive water from the systems upon the lots and to deposit sewage from their premises in the sewage system, which rights are the same as those given to all patrons of public service corporations engaged in the operation of utilities such as we have in question. The appellants concede that they should be charged for the upkeep, maintenance and depreciation, and the only question in controversy is whether they should pay an additional charge which would give some return upon the investment. This is a matter to be considered by the public service commission.

The judgment of the trial court was correct and is affirmed.

HOLCOMB, C. J., BRIDGES, TOLMAN, PARKER, FULLERTON, MAIN, and MOUNT, JJ., concur.

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Syllabus.

[No. 15878. Department One. August 18, 1920.]

D. A. CLEMENTS *et al.*, Respondents, v. W. W. Cook
et al., Appellants.¹

FRAUDS, STATUTE OF (44)—OPERATION OF STATUTE—MODIFICATION OF CONTRACT. Upon a vendor's refusal to deliver logs under a written contract, because of default in the payments, an oral agreement to continue deliveries if the purchaser would furnish security, which was done, is not objectionable as an oral agreement to modify the contract within the statute of frauds.

SAME (44, 60)—MODIFICATION OF CONTRACT—INSTRUCTIONS. Upon an issue as to an oral modification of a written contract, required by statute to be in writing, it is not error to fail to instruct the jury that the proof must show a written modification or be of the clearest and most satisfactory kind; since it is for the court to first determine whether there is positive, definite and unambiguous testimony of the modification sufficient to sustain the burden of proof, and if so, to submit it to the jury to determine whether it preponderates over evidence to the contrary.

SAME (44)—MODIFICATION OF WRITTEN CONTRACT. A contract required by statute to be in writing may be modified by an executed oral agreement.

APPEAL (449)—REVIEW—HARMLESS ERROR. In an action for breach of contract to deliver logs, the admission of evidence to show how much the buyer had paid on the purchase price of a mill taken from him on his default under a conditional sale contract, is harmless error, since it was a merely incidental and collateral matter and must have been so regarded by the jury.

SALES (77)—FAILURE TO DELIVER—JUSTIFICATION FOR BREACH. A seller cannot justify his refusal to deliver any more logs after receiving payment on the contract, on the ground that the buyer lost the mill soon afterwards through default under a conditional sale contract, thus leaving him in no position to perform, since if the seller had resumed delivery of logs, the owners of the mill might not have elected to forfeit the conditional sale contract.

EVIDENCE (16, 18)—JUDICIAL NOTICE. The court will take judicial notice of the prices fixed for timber by the war industry board during the time the Federal government had control of the logging industry in the state, and of the fact that there was a steady and increasing

¹Reported in 191 Pac. 874.

demand for all kinds of milling logs after the Federal government released control.

DAMAGES (77)—MEASURE OF DAMAGES—BREACH OF CONTRACT TO DELIVER LOGS. In an action for breach of contract to deliver logs in certain installments each month, covering a period of eight months after breach of the contract, an instruction fixing the measure of damages as the difference between the contract prices and the market prices at the date of breach of the contract, plus the reasonable cost of transporting other timber to the mill, is not prejudicial to the defendant, where the court could take judicial notice that the price of logs had increased during the period in question since the breach of the contract.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered December 6, 1919, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

Cooley, Horan & Mulvihill, for appellants.

J. Speed Smith, Henry Elliott, Jr., and Kerr & McCord, for respondents.

HOLCOMB, C. J.—In an action brought to recover \$16,000 damages for the alleged breach of a contract to deliver logs, plaintiffs recovered a verdict and judgment thereon for \$5,000, and defendants appeal.

There was a written contract entered into by the parties on December 19, 1920, and certain of its provisions with which we are here concerned are as follows:

“This memorandum of agreement, made and entered into by and between W. W. Cook, first party, and D. A. Clements, second party; witnesseth, that the first party agrees to log all of the merchantable timber now standing, lying or fallen on the S. W. quarter of the N. E. quarter; the N. W. quarter of the S. E. quarter, the N. E. quarter of the S. W. quarter and the E. half of the N. W. quarter, all in section 10, twp. 27, N. of Rg. 6 E. W. M., in Snohomish county, Washington, and to sell the said logs when so logged from said

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land to the said second party, delivering the same to the party of the second part at his mill situated on the S. W. quarter of the N. E. quarter of said section, in the manner and at the time, and upon the terms hereinafter set out, that is to say:

"The first party agrees to proceed diligently to log, and the second party agrees to proceed to operate said mill at the earliest practical time and to continue with all due diligence until the entire contract shall have been fulfilled, provided, however, that first party agrees to deliver at the place herein stipulated, and second party agrees to accept and pay for, at least three hundred thousand (300,000) feet of logs during each and every month, beginning with the month of January, A. D. 1918.

"The price to be paid for said logs shall be as follows, viz: For all fir, \$9.50 per thousand feet; for all cedar, \$12 per thousand feet; for all spruce, \$9.50 per thousand feet; and for all hemlock, \$8 per thousand feet.

"On the first day of each month second party shall pay first party for fifty per cent (50%), as nearly as can be readily ascertained or estimated, of the price of all logs delivered during the previous month, and on or before the tenth of the month shall render a statement of the logs delivered during the previous month and pay for any and all of such logs so delivered and not already paid for. . . .

"Time is the essence of this contract and of each and every part thereof, and in case of the second party failing to comply with the terms and all of the terms thereof, first party shall have the right and option to forthwith cancel the same and each and every part thereof upon giving three days' written notice and such notice and terms so specified therein shall have not been complied within said three days from the service of such notice upon second party. In case said second party shall absent himself so that it is not practical to serve such notice on him personally, then and in that case such notice may be served on any bookkeeper or managing agent in charge, or be served

in the manner provided for the service of summons in civil actions."

On the day following the execution of this contract, respondent, under a conditional sale agreement, acquired from the owners, John Johnson and W. S. Keller, the mill referred to in the logging contract. Thereupon appellant commenced delivering logs under the contract and respondent began to operate the mill. It appears from the record that, almost from the start, respondent experienced difficulty in promptly meeting payments, as they fell due, for the logs delivered by appellant; and on July 15, 1918, when respondent was delinquent in his payments to the amount of \$1,341.48, appellant refused to make further deliveries of logs, but suggested to respondent that if he (respondent) would furnish security for the payments on his contract, appellant would thereby be induced to carry out his part of the agreement. Thereupon the following agreement was entered into by W. S. Keller and his wife:

"This agreement, made this 15th day of July, 1918,
"Witnesseth, That whereas, on December 20th, 1917, D. A. Clements, doing business as the Clements Lumber Company, made and executed a contract with W. W. Cook to purchase from said Cook logs at the mill of said Clements Lumber Company and to pay for said logs as delivered on the 1st and 10th days of each month, and certain payments are due and the said Cook refuses to deliver more logs until the payments are guaranteed.

"Now, therefore, the undersigned W. S. Keller and Eula Keller, his wife, for a valuable consideration, do hereby agree and guarantee to make all payments provided for in said contract for the purchase of the logs therein sold, or any logs sold pursuant thereto or in any manner, up to and not exceeding the sum of thirty-five hundred dollars (\$3,500), by the said W. W. Cook

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to the said D. A. Clements or the Clements Lumber Company, as provided for in said contract, or at all.

“And upon the failure of the said D. A. Clements or the Clements Lumber Company to make payments promptly as provided for in said contract, the said parties hereto agree to pay all of said sums promptly upon demand, up to and not exceeding the sum of thirty-five hundred dollars (\$3,500) as aforesaid.

“It being understood that there is now due on said contract the sum of \$1,341.48, which became due on the 10th day of July, 1918, and it is agreed that said past due payment may be made on or before the 25th day of July, 1918, and if such payment is not made, then this guaranty shall apply thereto. . . .”

Later, respondent also delivered to appellant, as further security, two promissory notes of \$500 each, made payable to him by the Specialty Lumber Company. Appellant then resumed deliveries of logs, and continued to make deliveries until about the 10th or 12th day of August, when, respondent being again in default in his payments, appellant refused to deliver any more logs. At this time there was due appellant \$800 for logs delivered prior to the 1st day of August. Between August 1st and 10th, \$354.10 worth of logs were delivered. Appellant claims that the total amount of \$1,154.10 was due and payable on August 10, but respondent insists that, under the terms of the contract, only \$800 was due and payable on August 10, the remaining \$354.10 not being payable under the contract until the 1st of the following month, September. At any rate, appellant would not deliver any more logs until the \$1,154.10 was paid, and respondent said he would go to Seattle and try to get the money. He went to Seattle for this purpose on August 15. During his absence from the mill, appellant caused to be left there with one of the laborers, a notice in the following words:

"To D. A. Clements: You will please take notice that the payment in the amount of \$1,154.10 is past due and unpaid, under the contract made between you and the undersigned, under date of December 19th, 1917. You are hereby notified that unless said amount is paid within three (3) days of the date of the service of this notice upon you, that the undersigned will cancel said contract and declare all rights thereunder forfeited. This notice is given to you pursuant to said contract, and upon your failure to comply with this notice the undersigned will consider said contract forfeited and cancelled as provided therein.

"Dated this 15th day of August, A. D. 1918.

"W. W. Cook."

Respondent paid appellant the \$1,154.10 on August 21, and, according to the testimony of respondent, appellant said he would go to Monroe, get his crew together and start logging on the following morning. He did not do this, however, nor were any more logs delivered under the contract. On or about August 23, respondent having failed to make the payments due by the terms of the conditional sale agreement under which he purchased the mill, the vendors forfeited his rights thereto and took it back. Thereafter respondent brought this action for damages for the failure of appellant to deliver logs under the contract.

Much of the argument of counsel for appellant is in support of the contention that the original written contract for the delivery of logs could not be modified by the subsequent parol agreement just prior to July 15, 1918, when appellant is alleged to have promised that, if respondent would furnish security guaranteeing him payment for his logs, he would not forfeit the contract until any sum of money due him should exceed the amount of the security; and also the contention that the original contract could not be reinstated by appellant under an oral agreement on August 21, when it

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had already been (as appellant claims) canceled by the notice of August 15. We are convinced, however, that a determination of the question first presented will be decisive of the latter.

As to the steps leading up to the execution of the agreement by Keller and wife guaranteeing to Cook payment up to \$3,500 for logs delivered to Clements, Cook testified:

"I made a proposal to him that if he put up security for the payments on this contract—I think put up security—it would induce me to carry out the contract."

And respondent testified:

"He [appellant] said if we could furnish security so that he would be sure to get his money that he would not default his contract up to the amount of the security."

After the conversation with appellant, respondent went to Keller and told him that appellant "was willing to let the contract run behind if he had security for the payment of the logs;" and Keller then agreed to guarantee payment for the logs up to \$3,500. Appellant, respondent and Keller then went to the office of an attorney, where the guaranty was drawn up and signed. Appellant objected to the testimony that went to prove the oral agreement which led to respondent's procuring the guaranty, but for the purpose for which this evidence was offered it was allowable. At the time the guaranty was executed, appellant had just refused to make further deliveries under the log contract because respondent had failed to promptly pay for the logs delivered in accordance with the terms thereof; but appellant was willing to go on with his part of the contract if he had some assurance that he would get his money. He suggested as much to re-

spondent; and, acting upon his suggestion, respondent procured the guaranty from Keller and wife.

This is no more than an agreement of further performance of an unexecuted contract, of which time is the essence, with further assurance and guaranty on the one part, and a forbearance, for a consideration, to enforce the contract rights upon the default of the party bound thereby at the expiration of the time limit, on the other part.

Appellant contends that the court also erred in submitting the case to the jury under an instruction to the effect that the jury must find by a fair preponderance of the evidence that the contract in writing had been modified or its provisions waived, and that they were entitled to have this issue submitted to the jury under instructions that the degree of proof required in showing such a waiver of a provision of a written contract should also be evidenced by writings, or of proofs of the clearest and most satisfactory kind; citing *Brown v. Winehill*, 3 Wash. 524, 28 Pac. 1037. The general rule in this state, in civil cases, is that the burden of proof must be sustained by a fair preponderance of the evidence, and what is a fair preponderance of the evidence in a law case tried by a jury is for the jury to determine. Of course, it is true that, in order to prove a modification or a waiver of a contract required by law to be in writing, the proof should show modification or waiver by writings, or by clear and convincing evidence, or, as was said in the case cited, proof of the most satisfactory kind. But this means no more than that the evidence introduced to show a waiver or a modification of the writing should be certain, positive, unambiguous and definite in its terms, rather than the contrary; or, in other words, it means quality of evidence, rather than that

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it should be written, or overwhelming in quantity. It is first a question for the court to determine whether there is positive, definite and unambiguous evidence as to the waiver or modification of the written contract tending to sustain the burden of proof required therefor; and, if there is such evidence, it is the duty of the court to submit the case to the jury, the jury to determine whether it preponderates over evidence to the contrary. That is all that has ever been required of trial courts in equity cases tried by the court alone where evidence of a clear, cogent and convincing character is required to abrogate a contract for fraud, and like cases.

On the question now before us, this court used the following language in the case of *Gerard-Fillio Co. v. McNair*, 68 Wash. 321, 123 Pac. 462:

"The second question, whether the verbal contract modifying the original written contract was within the statute of frauds, is of more difficulty. . . . And this court has held that a contract modifying or abrogating a prior written contract required by statute to be in writing must itself be in writing to be obligatory. *Spinning v. Drake*, 4 Wash. 285, 30 Pac. 82, 31 Pac. 319; *Thill v. Johnston*, 60 Wash. 393, 111 Pac. 225. . . . These principles are relied upon to support the judgment of the trial court; but it seems to us that they do not meet the question presented. While it is the rule that a written executory agreement to sell or purchase real estate cannot be rescinded or abrogated by an oral executory agreement to rescind or abrogate, it does not follow that such an agreement cannot be modified or abrogated by an executed oral agreement. On the contrary, it is recognized by our own cases above cited, and it is the rule of all the cases in so far as we are advised, that an executed oral contract to modify or abrogate a written contract, required by statute to be in writing, can be successfully pleaded as a defense to an action on the original

contract. To hold otherwise is to make the statute of frauds an instrument of fraud; for it would be fraud to allow a person to enforce a contract which he had agreed on sufficient consideration to modify or abrogate after he has accepted the consideration for its modification or abrogation. It is for this reason that equity allows a performance or a substantial part performance of a contract, invalid because not in writing, modifying or abrogating a valid contract to be pleaded as a defense to an action on the valid contract. To do otherwise would be to allow one of the parties to have the benefit of both contracts when in equity and good conscience he should have the benefit of but one."

See, also, *Oregon & Wash. R. Co. v. Elliott Bay Mill & Lum. Co.*, 70 Wash. 148, 126 Pac. 406; *Stoner v. Fryett*, 91 Wash. 89, 157 Pac. 213.

The case now before us comes within the rule we announced in the *Gerard-Fillio* case; and, that being true, it follows that appellant had no right, after the \$1,154.10 was paid him on August 21, to treat the contract as canceled and refuse to carry out his part of it. At that time he had in his possession the guaranty by Keller and wife and the notes. These were security to the amount of \$4,500, when, at the most, there was only \$1,154.10 owing to him, and, under the contract, but \$800 of this amount was due and payable on August 21, when, in fact, respondent paid the entire amount of \$1,154.10. The remaining \$354.10 was for logs delivered after the 1st of August and, under the contract, was not due until September 1. Assuming that it was necessary for appellant, on August 21, to make a new promise, it would seem that this payment of \$354.10 before due was sufficient consideration to support it.

The court, therefore, properly admitted and rejected evidence under the issues involved therein and properly submitted the case to the jury, and there is no

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error as claimed by appellant in the giving or refusing of such instructions.

The admission of testimony by respondent as to how much money he had paid on the purchase price of the mill cannot be said to have had any tendency to injure the case of appellant; at least not to the extent that it constituted reversible error. It was a merely incidental and collateral matter and could not have been regarded by the jury as of any importance.

It is earnestly insisted by appellant that there was not sufficient evidence to submit to a jury that would justify a verdict for respondent. But it is clear that there was direct conflict in the testimony by the parties to the controversy upon the questions here at issue. There was no error in the refusal of the court to take the case away from the jury.

Some attempt is made to justify the refusal of appellant to deliver any more logs after receiving the \$1,154.10, on the ground that a day or so after that time the mill was taken away from respondent, leaving him in no position to perform the contract. If appellant may be permitted to make such an assumption, it certainly may, with as much, or more, reason, be assumed that Keller and Johnson would not have taken steps to forfeit the conditional sale contract if appellant had on August 21 resumed deliveries of logs to respondent. Respondent entered into the original agreement with appellant for the purpose of milling logs which appellant was to deliver, and when appellant failed to deliver logs, he breached the contract and respondent was entitled to damages.

Appellant earnestly contends that the court did not submit the proper measure of damages to the jury under the instructions given and refused, urging that there was no proof of the market value of logs at any

other time than the 15th day of August, the date respondent alleged the contract was breached. There was a balance of two and one-half million feet of timber to be delivered. This was to be delivered in installments of not less than three hundred thousand feet per month; so that it was optional with appellant to deliver not more than this under the contract for delivery by installments; and as there is no proof of the market value of logs at any date subsequent to August 15, it is contended that there was no proof to submit to the jury upon which they could base a verdict.

Alpha Portland Cement Co. v. Oliver, 125 Tenn. 135, 140 S. W. 595, is quoted to this effect:

“ ‘The law is that where goods are to be delivered in installments, or as requested by the purchaser, the true measure of damages is the difference between the contract price and the market price or values at the times when such articles were required or ordered.’ *Sagola Lumber Co. v. Chicago Title, etc., Co.*, 121 Ill. App. 298.”

To the same effect are cited: *Crescent Hosiery Co. v. Mobile Cotton Mills*, 140 N. C. 452, 53 S. E. 140, 6 Ann. Cas. 164; *Hill v. Chipman*, 59 Wis. 211, 18 N. W. 160; *Johnson & Thornton v. Allen & Jemison*, 78 Ala. 387, 392.

Appellant then says that this court cannot presume that the market value of these logs went up at any time after August 15, 1918. Neither can this court presume that the market value of these logs went down at any time after August 15, 1918. It can, however, presume that, since the parties stipulated the market value of the various grades of logs in controversy here as of certain prices on August 15, 1918, which stipulation was given to the jury, together with the prices fixed thereunder, and since no evidence of an increase or a decline in price was given by either party, that

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price remained stationary for the time that this contract would have been enforced as to the deliveries, namely, during about eight months. There was evidence also before the jury that the cost of hauling the nearest logs, other than the logs covered by this contract, to the mill of respondent would have been in the neighborhood of \$3 per thousand, which, in other words, would have added to the price of such logs by that much, or would have reduced the value thereof to respondent that much, and upon two and one-half million feet of logs would have amounted to \$7,500, or more than the verdict awarded by the jury. This, of course, is not the measure of damages which the court submitted to the jury, which was that:

“ . . . if . . . the plaintiffs are entitled to recover a verdict at your hands, the measure of plaintiffs' damages will be the difference between the contract prices fixed for the different kinds and varieties of timber and the stipulated market prices or value of the different kinds and varieties of timber, plus what you shall find from the evidence would be the fair and reasonable cost of transporting other timber to the mill.”

This instruction then gave the jury for their information the stipulation as to the amount of timber and the prices of different kinds and grades thereof.

But from circumstances of which we can take judicial knowledge as to the prices fixed for such timber by the War Industries Board, an agency of the Federal government in the prosecution of the war then being waged, from and after June 11, 1918, two months prior to the breach of this contract, to and including January 15, 1919, when the Federal government released control of the logging industry in this state, the price for such logs in the Puget Sound district ranged from \$1 per thousand, for No. 1 and No. 3 fir, to \$2

per thousand, for No. 2 fir, more than the stipulated prices of timber here involved on August 15, 1918. We will also take judicial knowledge of the fact that, after the Federal government released control of the logging industry in this state on January 15, 1919, there was a steady and increasing demand for all kinds of milling logs in this state; so that, under the circumstances, it cannot be presumed that the price of such logs declined, but, on the contrary, it may be presumed that the price increased. We are therefore of the opinion that appellant is not prejudiced by the submission of the measure of damages as it was submitted by the court to the jury, and the recovery thereon by respondent; and in the absence of an affirmative showing of prejudice thereby on the part of appellant, we are not now inclined to disturb it. We are inclined to think that the verdict was very moderate under the circumstances, and probably more favorable to appellant than he could expect from another trial.

We find no error in the record and the judgment is affirmed.

PARKER and BRIDGES, JJ., concur.

MAIN and MITCHELL, JJ., concur in the result.

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[No. 15833. Department One. August 18, 1920.]

*In the Matter of the Estate of BREWSTER FERREL,
Deceased.*¹

TAXATION (229)—INHERITANCE TAX—COMPUTATION—DEDUCTION OF FAMILY ALLOWANCE. In the computation of the inheritance tax, \$1,000 is deductible from the estate as a family allowance, as expressly provided by Laws of 1917, p. 593, § 1, notwithstanding the executors were acting under a nonintervention will which made no provision therefor; in view of the wide scope of the authority of such executors under Laws of 1917, p. 642, § 93, and the fact that the law authorizes the allowance for the welfare of the family as if the testator himself had made the provision.

SAME (229)—EXEMPTIONS FROM TAX—STATUTES—CONSTRUCTION. Laws of 1917, p. 196, amending Rem. & Bal. Code, § 9183, and providing for an inheritance tax of one per cent of the value of estates not exceeding \$50,000, if passing to a wife or lineal descendant, provided that, in such case, \$10,000 of the net value of any estate shall be exempt from such tax, must be construed as meaning that one exemption of \$10,000 should be allowed, and not as many as there are heirs or legatees, if more than one.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered February 2, 1920, upon findings in favor of the executors of an estate, in proceedings to determine the method of computing an inheritance tax, after a trial to the court upon stipulated facts. Reversed.

J. M. Thatcher and Geo. G. Hannan, for appellants.
Gose & Crowe, for respondent.

HOLCOMB, C. J.—On or about September 27, 1918, Brewster Ferrel died in Walla Walla, leaving an estate valued at over \$279,000. By nonintervention will, the deceased gave the estate to his widow and seven children and appointed his four sons executors. The will was admitted to probate, the executors quali-

¹Reported in 192 Pac. 10.

fied, and the estate was duly administered. A controversy arose between the executors and the state tax commissioner as to the method of computing the inheritance tax upon the estate. Being unable to agree thereon, they entered into a stipulation as to the facts and submitted to the trial court the question of the amount of inheritance tax due the state. After hearing the case, the trial court made findings, to which certain exceptions were allowed the state, and thereafter entered judgment in favor of the executors. The state, by the tax commissioner, has appealed.

A number of assignments of error are made upon certain findings of the court and the rendering of its decree; but, in their last analysis, these assignments present here for determination but two questions, viz.:

Whether, in the computation of the inheritance tax, \$1,000 may be deducted from the estate as a family allowance, during administration under a nonintervention will, without order of the court, but later found to be reasonable and valid; and whether, in the computation of the inheritance tax, the entire estate left by the deceased is entitled to a single exemption of \$10,000, or whether the amount passing to each legatee as a separate entity is entitled to the exemption of \$10,000.

Taking up the first question, we find, by referring to ch. 146, p. 593, Laws of 1917 (amendment of inheritance tax act), that § 1 thereof provides:

“That section 9182 of Remington and Ballinger’s Code be amended to read as follows:

“Section 9182. All property within the jurisdiction of this state, . . . which shall pass by will . . . shall, for the use of the state, be subject to a tax as provided for in section 9183 [which provides for the levying of the inheritance tax], after the payment of all debts . . . and family allowance not to exceed \$1,000, . . .”

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Appellant calls attention to sections 92 and 93 of the probate code, ch. 156, p. 642, Laws of 1917, the two sections named appearing under the heading, "Settlement of Estates without Administration," on pp. 666 and 667; and says that, under these two sections, the executors obtain their authority, not from the court or the general laws in regard to ordinary wills, but from the will itself. Appellant then argues that the will nowhere authorizes the executors to make any family allowance; that to make such allowance is a violation of the terms of the will, the only document through which the executors receive their authority, and that they should be bound in all their actions by its provisions.

Section 92 of the probate code provides for the settlement of estates without intervention by the court, when so directed in the will; and also provides for the making of the court's order of distribution, and for the procedure in the event of refusal or disqualification of an executor or of any mismanagement of the estate by an executor, such provisions not being material here. Section 93 gives to executors acting under nonintervention wills a very wide scope of authority. Under this section it would seem that the executors in the instant case had power to do several things in connection with the handling of the real and personal property which they did not even attempt to do, and compared to which the mere paying out to the widow, for her support pending settlement of the considerable estate, something in excess of \$1,000 in the form of a family allowance, seems rather insignificant. The law authorizes the allowance for the welfare of the family, and it is as much a part of the rights of the family during administration as if the testator had himself made the provision therefor.

We conclude that an allowance of \$1,000 was a proper deduction from the estate.

The second question is whether, in computing the inheritance tax, the amount of the exemption shall be deducted but once, that is, from the net estate here subject to the inheritance tax; or whether \$10,000 of the share of each beneficiary is exempt from taxation.

Chapter 43, p. 196, Laws of 1917, under the heading Taxation of Inheritances, provides:

"Section 1. That section 9183 of Remington & Balinger's Code be amended to read as follows:

"Section 9183. The inheritance tax shall be imposed on all estates subject to the operation of this act at the following rate:

"If passing to or for the use of a . . . wife . . . (or) lineal descendant, the tax shall be one per centum of any value not exceeding fifty thousand dollars; . . . *Provided, however,* That in the above cases, ten thousand dollars of the net value of any estate shall be exempt from such duty or tax."

Here, \$45,058 passed to the widow and \$12,548.41 passed to each child.

The particular question involved in this case does not appear to have been heretofore presented to this court. The original inheritance tax law, ch. LV, § 2, Laws of 1901, p. 68; Rem. & Bal. Code, § 9183, provided for a graduated inheritance tax levy, and in regard to direct heirs, enacted as follows:

"The inheritance tax shall be and is to be levied on all estates subject to the operation of this chapter (act) on all sums above the first ten thousand dollars, where the same shall pass to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, or the lineal descendant of an adopted child, one (1) per centum. . . ."

This section was amended by the legislature of 1917, by ch. 43, p. 196, Laws of 1917, section 1 of which has

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been hereinbefore quoted. The 1901 statute, providing for an inheritance tax on all estates in excess of \$10,000 passing to direct heirs, is merely changed by the act of 1917 so that the exemption of \$10,000 occurs in the proviso to the amendment exempting that sum from the net value of any estate from such duty or tax.

We have uniformly held that the inheritance tax provided for in this state is a succession tax on distributive shares upon devolution of an estate, holding in several cases to the effect that an inheritance tax is not one on property, but one on the succession of property. The right to take property by devise or descent is a creature of the law and not an inherent right or privilege, and therefore the authority which confers it may enforce conditions upon it. *State v. Clark*, 30 Wash. 439, 71 Pac. 20; *In re Clark's Estate*, 37 Wash. 671, 80 Pac. 267; *In re White's Estate*, 42 Wash. 360, 84 Pac. 831; *In re Stixrud's Estate*, 58 Wash. 339, 109 Pac. 342, Ann. Cas. 1912 A 850, 33 L. R. A. (N. S.) 632.

We also held, in *In re Corbin's Estate*, 107 Wash. 424, 181 Pac. 910, and in *In re Smith's Estate*, 107 Wash. 698, 183 Pac. 517, that each legacy should be considered as a separate entity and taxed as such at the statutory rate. But none of those cases involved the question of whether the exemption of \$10,000 allowed by the statute is one exemption of \$10,000, or as many exemptions of \$10,000 as there are heirs or devisees coming within that class where the exemption is granted.

Respondents cite a number of cases from New York, Kentucky, Colorado and the United States supreme court, which are claimed to sustain their contention to the effect that the exemption should be deducted from each distributive share of each of the devisees or heirs where in excess of \$10,000.

The supreme court of the United States, in *Knowlton v. Moore*, 178 U. S. 41, passed upon the act of Congress of June 13, 1898, sections 29 and 30 (30 U. S. Comp. Stat. 448); the language of the provision of § 29 beginning as follows:

“That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, . . .”

The supreme court held, Justices Harlan and McKenna dissenting therefrom, that in view of the above-quoted language providing that “any person or persons having in charge or trust, as administrators, etc., any legacies or distributive shares arising from personal property where the whole amount of *such personal property as aforesaid* shall exceed the sum of ten thousand dollars in actual value, passing, . . . either by will or by the intestate laws of any state or territory,” by the use of the words, “having in charge or trust, . . . any legacies or distributive shares arising from personal property where the whole amount of *such personal property as aforesaid* shall exceed the sum of \$10,000 . . . passing,” etc., emphasizing the relation of the words, “such personal property as aforesaid,” to the clause, “any legacies or distributive shares,” manifested the intention of Congress to tax only the legacies in excess of \$10,000 arising from such personal property. That decision and that construction of the Federal statute therefore do not seem to be in point upon our statute, nor are we

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bound by that decision in construing the terms and intent of our state legislation.

In New York the language of the act of June 10, 1885 (Laws of N. Y. 1885, p. 820), was that:

"After the passage of this act, all property which shall pass by will, etc.," other than to certain excepted persons, "shall be and is subject to a tax of \$5 on every \$100 of the clear market value of such property . . . Provided, That an estate which may be valued at a less sum than \$500 shall not be subject to said duty or tax."

In passing upon this act, the New York court of appeals stated that "estate," as used in this proviso, refers to the estate or share of each beneficiary acquired through the will or the statute of distribution, which is to be valued, and the duty estimated, according to its value. *In re Howe's Estate*, 112 N. Y. 100; *In re Cager's Will*, 111 N. Y. 343. Nor does the language of that act appear to be sufficiently identical with the language of our act.

The Kentucky statute (Ky. Stat. 1915, ch. 108, § 4281a, p. 2160), provided that:

"All property which shall pass, by will or by the intestate laws of this state, . . . or any interest therein, or income therefrom, which shall be transferred by deed, grant, sale or gift, made in contemplation of the death of the grantor or bargainer, or intended to take effect in possession or enjoyment after such death, to any person or persons, . . . shall be, and is, subject to a tax of five dollars on every one hundred dollars of the fair cash value of such property, and at a proportionate rate for any less amount, . . . Provided, That the first five hundred dollars of every estate shall not be subject to such duty or tax."

In passing upon this act, the Kentucky court of appeals said:

"The tax is upon the individual, and can be imposed only when the particular interest in the dece-

dent's estate passing to him exceeds \$500." *Booth's Ex'r v. Commonwealth ex rel. Jefferson County Atty.*, 130 Ky. 88, 113 S. W. 61.

The language of the Kentucky act is very nearly identical with the New York act regarding the taxing of the legacy, bequest or distributive share after the first \$500.

In *State v. Clark, supra*, we held that the exemption in the inheritance tax law of 1901, *supra*, from the provisions of the act of sums below \$10,000, when the estate passed to direct heirs and kindred, was not invalid as violating the constitutional requirements of equality in taxation, for the reason that it did not extend the same exemption to devises to collateral heirs or strangers to the blood, because the \$10,000 was to be deducted from the portion of the estate devised to the first class mentioned and not extended to collateral heirs or strangers to the blood. It appeared to be there impliedly held or assumed that the \$10,000 exemption was an exemption to the class from the whole estate, and not an exemption to each of the heirs or devisees.

California appears to have a statute specifically providing that the exemption shall be deducted from the shares of the persons classified granted exemptions, thereby granting the exemption to each of such persons so classified. Statutes of California, 1905, p. 343; *Id.*, 1911, p. 715.

Iowa appears to apply the exemption under a statute providing that the tax is payable on the value of the estate above \$1,000 remaining after the payment of all debts, from all the bequests or devises as a whole and not from each legacy. *In re McGhee's Estate*, 105 Ia. 9, 74 N. W. 695; *Harriott v. Bacon*, 110 Ia. 342, 81 N. W. 701. The same also appears to be

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the rule in Pennsylvania. *Howell's Estate*, 147 Pa. 164, 23 Atl. 403. Utah follows the Pennsylvania rule, and in announcing it cites the above-named Pennsylvania case in *In re Dixon v. Ricketts*, 26 Utah 215, 72 Pac. 947. Montana also gives it the same construction. *State ex rel. Gilmore v. District Court*, 45 Mont. 335, 122 Pac. 922.

In view of the language of our statute of 1917, amending the act of 1901, we are of the opinion that the proviso was inserted in the form it was, as a proviso in the act of 1917 (Laws of 1917, p. 196), on account of its having been omitted from the enacting clause in amending the former act. The proviso seems to be clear in its intention:

"Provided, however, That in the above cases, ten thousand dollars of the net value of *any estate* (not of *any such share*, as was the case in the United States supreme court case, *supra*) shall be exempt from such duty or tax."

It is the rule that the provision of a law granting exemption is to be strictly construed against a claimant. The beneficiary must be clearly within the statutory language. Dos Passos on Inheritance Tax Law (2d ed.), p. 74, and cases cited.

When we construe this language strictly, notwithstanding the fact that it is a change in language from the original act granting the exemption of \$10,000, we are of the opinion that the statute manifestly meant that only one exemption of \$10,000 should be allowed, and not as many exemptions as there were heirs or legatees, if there were more than one.

In consequence of these observations, the decree of the trial court should be modified so that the exemption of \$10,000 shall be deducted from the net value of the community half-interest to be distributed, viz., \$132,896.87, leaving the sum of \$122,896.87 subject to

the tax thereon at one per cent, amounting to \$1,-228.96.

Reversed and remanded with instructions to enter decree in conformity herewith.

PARKER, MAIN, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 15768. Department Two. August 18, 1920.]

W. H. FISHER, *Respondent*, v. SCHWABACHER HARDWARE COMPANY, *Appellant*, SEATTLE TRUST COMPANY, *Defendant*.¹

SUBROGATION (1)—SURETIES OR GUARANTORS. Where a co-guarantor of the debts of an insolvent corporation for the year 1914, died and his estate was compelled to pay in full the judgment recovered on the guaranty, the estate or its successor in interest might enforce contribution from the surviving guarantor; and hence is entitled to be subrogated to the rights of the judgment creditor in and to dividends from the bankrupt estate which had by agreement with the surviving guarantor been all applied upon an additional guaranty of the insolvent debts for the subsequent year to which the estate was not a party or liable thereon.

JUDGMENT (70, 109)—ENTRY—TIME FOR ENTRY—VACATION—IRREGULARITIES. Where a motion for a new trial was granted unless plaintiff remitted \$2,000 from the verdict, the clerk's entry of judgment on the verdict after denial of motion for judgment notwithstanding the verdict, although not immediately, as required by Rem. Code, § 431, was proper, the remission of \$2,000 being thereafter entered as a credit on the execution docket; and it was error to vacate it as being entered contrary to instruction.

Appeal from a judgment of the superior court for King county, Hall, J., entered July 29, 1919, upon findings in favor of the plaintiff, in an action for equitable relief, tried to the court. Affirmed.

Trefethen & Findley, for appellant.

Wright, Kelleher, Allen & Hilen, for respondent.

¹Reported in 191 Pac. 1104.

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TOLMAN, J.—For several years prior to 1914, the Seldovia Salmon Company had been operating a canning plant in Alaska, and selling its product in the city of Seattle. Though a corporation, its affairs were carried on like a partnership, by Julius Redelsheimer and Benjamin Moyses, each owning an equal number of shares of its capital stock, and they two owning all of its stock except two shares held by a third person merely to qualify him to act as trustee of the corporation.

The Schwabacher Hardware Company, appellant here, had been extending large credits to the salmon company on open and running account, and in 1914 Redelsheimer and Moyses each gave a separate and personal guaranty of such open account in the sum of \$5,000. Redelsheimer died soon after the close of the 1914 fish packing season, and the salmon company was managed and operated by Moyses during the season of 1915, he then giving an additional personal guaranty covering the 1915 account of the Schwabacher Hardware Company, in which guaranty the estate of Julius Redelsheimer did not join. In the fall of 1915, the Schwabacher Hardware Company began an action against the Seldovia Salmon Company, the estate of Julius Redelsheimer, deceased, and Benjamin Moyses to collect the 1914 account guaranteed by the two officers of the salmon company, which resulted in a judgment entered December 2, 1915, against the salmon company, Moyses and the estate of Julius Redelsheimer, in the principal sum of \$5,000, but for some reason which does not clearly appear, the judgment was made to draw interest for a greater length of time as against the salmon company and Moyses, so that the Redelsheimer estate was, in fact, liable on that judgment for about \$250 less than was the salmon company and Moyses.

Thereafter, on December 15, 1915, the salmon company was adjudged a bankrupt, and the Schwabacher Hardware Company presented and proved two claims against the bankrupt estate, one on the judgment for \$5,647.50, and a further claim for \$4,428.34, representing the 1915 book account, which had been guaranteed by Moyses and not by Redelsheimer or his estate. Thereafter there were two dividends declared and paid in the bankruptcy proceedings, aggregating a little more than 26 per cent of the face of the claims as filed and allowed. By an agreement between Moyses and the Schwabacher Hardware Company, the latter applied the whole of these dividends upon both claims, when received, toward the payment of the 1915 account, and no part of either dividend was credited upon the judgment against the Redelsheimer estate. It appears also that, at the time Moyses agreed that the dividends upon both claims in bankruptcy should be so applied, there was also an understanding between himself and the hardware company that Moyses should turn over to the hardware company certain stock of the Columbia Salmon Company, a corporation, as part payment, and that thereafter the hardware company, so far as Moyses was concerned, would look to certain real estate belonging to Moyses, upon which this and other judgments against him were liens, for the satisfaction of the balance of its claim represented by the judgment.

Later the hardware company began proceedings in the matter of the estate of Julius Redelsheimer, looking to the removal of the executrix on the ground that she was not adequately performing her duties, and by stipulation and a decree thereafter entered by the court thereon, the claim against the Redelsheimer estate was settled by the payment by the executrix to

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the hardware company of the sum of \$4,199.17, that being the amount due on the judgment against the Redelsheimer estate after crediting the dividends declared upon the judgment claim in the bankruptcy proceedings, and in and by the stipulation and the decree it was provided, in effect, that to the extent of the payment so made, the Redelsheimer estate should be subrogated *pro rata* to any and all liens and rights existing in favor of the hardware company against the estate and property of any other judgment debtor in said judgment, and particularly Benjamin Moyses, then deceased, and his estate.

Benjamin Moyses having died, it was found advisable that the lands theretofore belonging to him, upon which the judgment was a lien, should be exchanged for other lands, and it was agreed that the title to the lands thus acquired should be taken in the name of the Seattle Trust Company, as trustee, to sell and dispose of the proceeds according to the priority of the several judgment liens against the Moyses lands so exchanged.

Respondent, Fisher, having succeeded to the interest of the Redelsheimer estate, brought this action against the trust company, the hardware company, and the executors, and all those beneficially interested in the Moyses estate, to establish the right of the trust company to sell such real estate, require it to do so, determine the amount due the hardware company on its judgment against Moyses, and to direct the proper disbursement of the funds to be realized from such sale. The trial court made an interlocutory decree, directing the sale of the lands, and that being done, supplemental issues were framed in which respondent claimed all of the fund realized by the trustee from the sale of the land, except a very small amount which it was conceded should be paid to the hardware company.

The trial court found that, under the stipulation and decree entered in the proceedings instituted by the hardware company in the probate of the Redelsheimer estate, the Redelsheimer estate had paid to the hardware company \$4,199.17 in full of the judgment against it, and in consideration of such payment, the hardware company had assigned to the Redelsheimer estate a proportionate interest in the judgment against Moyses, this finding following the provisions of the stipulation and decree in the probate proceedings hereinbefore referred to; and the court further found that the respondent, as successor in interest of the Redelsheimer estate, was the owner of a *pro rata* interest in the judgment of 4199.17/4555.77 thereof, and that the hardware company was the owner of the remaining 356.60/4555.77 of the judgment, and directed that the portion of the funds applicable to the payment of this judgment should be distributed, \$1,856.09 to respondent, and \$157.62 to the hardware company. From a decree based on that finding, this appeal is taken.

It seems to be appellant's contention that, notwithstanding the stipulation and decree in the probate proceedings, it may now enforce the oral agreement between itself and Moyses and credit all of the dividends paid through the bankruptcy court on the claim represented by the judgment, on the 1915 account, upon which the Redelsheimer estate was not liable, leaving the original judgment unaffected thereby. We think this contention untenable, because, while the original debt was that of the salmon company, both Redelsheimer and Moyses were guarantors thereof, and, as between themselves, either one paying the whole debt, or any proportion thereof greater than one-half, might enforce contribution from the other; consequently any agreement applying the dividends on the claim repre-

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sented by the judgment to the payment of the open account would be effective only as against the parties to such agreement. The Redelsheimer estate, not being a party thereto, was not bound thereby, and although by the judgment made liable for the debt, it might, if called upon to pay such judgment, in whole or in part, look to the salmon company, so far as it had assets, to be made whole, and after such assets had been exhausted, it might claim contribution from Moyses, its co-guarantor, to an extent which would equalize the liability between them. This situation was recognized by the decree in the probate proceedings, and no appeal having been taken from that decree, it became final and binding upon the parties thereto, both the hardware company and the Redelsheimer estate, and respondent, as the successor in interest of the Redelsheimer estate, may claim the benefit thereof

The judgment of the trial court is affirmed.

HOLCOMB, C. J., BRIDGES, FULLERTON, and MOUNT, JJ., concur.

[No. 15825. Department One. August 18, 1920.]

ADA M. ROGERS, *Appellant*, v. JOHN E. SAVAGE *et al.*,
Respondents.¹

NEW TRIAL (5)—SUCCESSIVE APPLICATIONS—POWERS OF COURT. The court has no jurisdiction, after the denial of a motion for new trial and the proper entry of judgment in the case, to again consider a like motion, based upon the same grounds, and make another order in the case.

APPEAL (388)—RIGHT TO ALLEGE ERROR—CROSS-APPEALS. The supreme court is limited to matters complained of by appellant, in the absence of a cross-appeal by respondent.

Appeal from an order of the superior court for King county, John L. Corrigan, judge *pro tempore*, entered December 13, 1919, vacating a judgment and granting a new trial, after the verdict of a jury rendered in favor of the plaintiff. Reversed.

Van C. Griffin, for appellant.

Piles & Halverstadt, for respondents.

MITCHELL, J.—This case was tried to a jury, and a verdict was returned and filed on September 18, 1919, in favor of the plaintiff in the sum of \$5,000. Defendants served and filed two motions, one for judgment *non obstante veredicto*, the other for a new trial. The motion for a new trial was made in part for "errors in law occurring at the trial and excepted to at the time by the defendants." Thereafter, November 7, 1919, both motions came on for hearing, were presented to and disposed of by the court, as shown by the entry made by the clerk in the journal on that date as follows:

"Motion for new trial granted unless plaintiff consents to reduction of damages from \$5,000 to \$3,000.

¹Reported in 192 Pac. 13.

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Plaintiff to have ten days to consider and submit choice.

"Defendants' exceptions signed. Motion for judgment *non obstante veredicto* denied. Whereupon in conformity of the statute, judgment is hereby entered in favor of plaintiff and against defendants for \$5,000 in accordance with verdict."

The entry shows the notation (no date given): "Entry in execution docket, volume 58, page 272."

Choosing to comply with the terms imposed by the court in making the order denying the motion for a new trial effective, plaintiff, on November 8, 1919, filed in the clerk's office a duly signed and acknowledged writing remitting \$2,000 from the amount of damages awarded by the jury. On November 19, 1919, the clerk carried the judgment to the execution docket and entered it at volume 58, page 272. It shows a judgment against defendants in the sum of \$5,000, with an endorsement thereon as follows: "Remission of \$2,000 from this judgment by plaintiff filed Nov. 8, 1919."

Thereafter, November 24, 1919, defendants filed a motion for an order as follows:

"To set aside the order heretofore rendered and entered herein denying defendants' motion for a new trial, and to grant a rehearing on said motion and a reargument thereof, upon the ground and for the reason that said motion was decided contrary to law and through the inadvertence and oversight of defendants' attorneys in not having discovered and called to the attention of this court a decision of the supreme court of this state in the affidavit heretofore attached."

On December 4, 1919, defendants served and filed a motion for an order setting aside the judgment entered by the clerk, claiming such entry was contrary to the instructions of the court. On December 6, 1919, an order was signed and entered granting the motion

to set aside the judgment and continuing the motion for a rehearing of the motion for a new trial to December 13, 1919. On the latter date the motion for a rehearing of the motion for a new trial was presented to the court and granted, as shown by an entry in the journal, and a formal order to that effect was signed and entered on December 18, 1919.

Plaintiff has appealed, and contends the judgment was erroneously set aside, and that the court had no power to re-entertain the motion for a new trial after the judgment and the formal order denying the motion for a new trial had been entered.

Section 431, Rem. Code, provides that, when a trial by jury has been had, judgment shall be entered by the clerk immediately in conformity to the verdict. The record is silent as to why the clerk did not enter judgment on the day the verdict was received, but manifestly it was to accommodate respondents, at least it was to their advantage in the filing of their motion for a judgment *non obstante veredicto*, under the rule repeatedly announced by this court that such motion is untimely coming after entry of judgment upon the verdict. *Carkonen v. Columbia & P. S. R. Co.*, 86 Wash. 473, 150 Pac. 1162; *Paich v. Northern Pac. R. Co.*, 86 Wash. 379, 150 Pac. 814; *Forsyth v. Dow*, 81 Wash. 137, 142 Pac. 490.

The filing of a motion for a new trial at the same time the motion for judgment *n. o. v.* was filed in no way interfered with nor interrupted the entry by the clerk of judgment upon the verdict. While § 402 of the code (Rem.) provides that a motion for a new trial in jury cases must be served and filed within two days after the verdict, § 431 of the code, after directing the clerk to immediately enter judgment upon the verdict, provides that, if a motion for a new trial shall

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be filed, execution shall not issue upon the judgment until the motion shall be determined; and further provides that the granting of such a motion shall operate as the setting aside of the judgment. Thus, seeing that a motion for a new trial in no way stays the entry by the clerk of a judgment on the verdict, it became the duty of the clerk in the present case to perform, as he did, the ministerial act of entering the judgment immediately upon the denial of respondents' motion for judgment *non obstante veredicto*, unless there was some valid reason to the contrary.

The formal order signed on December 18, 1919, on the subject of the entry of the judgment by the clerk, says:

"And it appearing to the court that, on the 7th day of November, 1919, upon the ruling of the court denying defendants' motion for a new trial herein, and defendants' motion for judgment *non obstante veredicto*, the clerk of this court, contrary to said rulings, and contrary to the instructions of the court, entered a judgment for \$5,000, in favor of the plaintiff above named and against the defendants above named, as shown by the minutes of the court in said cause, and that said judgment was contrary to the rulings and instructions of the court."

It is not made clear as to just what is meant by the words "as shown by the minutes of the court." Section 75 of the code, in enumerating the books the clerk shall keep, provides, in subd. 3 thereof, for a "minute-book" designed solely for the purpose of keeping accounts of the attendance and mileage of witnesses and jurors, to enable the clerk to make out cost bills. Subd. 4 of the same section provides:

"He shall also provide and keep a well-bound book, to be called the order book or journal, in which he shall record the daily proceedings of the court, and

enter all verdicts, orders, judgments, and decisions thereof,”

Therefore, we take it that the words “as shown by the minutes of this court” refer to journal entries, which, to say the least, have never been ordered altered or expunged as correctly showing all the proceedings of the court, orders, judgment, and decisions had and made on the dates mentioned.

The only orders or decisions of the court it could be claimed were violated by the clerk in entering the judgment were, (1) the journal entry of November 7, 1919, hereinbefore set out in full, and (2) the journal entry of December 6, 1919, wherein it is simply stated: “Defendants’ motion to set aside judgment entered by the clerk on November 7th, 1919, argued. Granted.” This last entry gives no evidence of any ruling violated by the entry of judgment; nor does the entry of November 7, 1919. It says: “Motion for a new trial granted unless plaintiff consents to reduction of damages from \$5,000 to \$3,000. Plaintiff to have ten days to consider and submit choice. Defendants’ exceptions signed.” Plaintiff did consider, and on the next day filed in the cause a written remission of \$2,000, which automatically reduced the \$5,000 judgment to that extent. The journal entry of the judgment gave notice of the volume and page of the execution docket to which it was carried, and that in turn showed a credit of \$2,000 upon the judgment as entered, as required by §§ 448, 454 of the code, concerning entries in the execution docket of all proceedings subsequent to the judgment, down to and including final satisfaction.

The condition imposed by the trial judge upon which the motion for a new trial would be denied was met within the time limited, and the judgment entered, together with the credit thereon entered in the execution

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docket, became fixed, certain and definite and was the judgment the verdict of the jury, thus reduced by the court, called for. We think the order setting it aside was erroneous.

On the second branch of the case we are satisfied that the trial court had no power to reconsider the motion for a new trial at the time it did. This is not a case falling within the provisions of § 303, Rem. Code, providing for relief in case of mistake, inadvertence, surprise or excusable neglect, such as was the case of *Clein v. Wandschneider*, 14 Wash. 257, 44 Pac. 272; for the affidavit and motion upon which the court acted states that the court had erroneously decided the motion in the first instance because attention had not been called to a recent decision of this court which it was claimed controlled the situation. The order of the court of December 18, 1919, is to the same effect. It says, among other things:

“And the court being of the opinion that its order heretofore made and entered herein on the 7th day of November, 1919, denying defendants’ motion for a new trial herein was erroneous, and that said error was committed solely by reason of the fact that the decision above referred to was not called to the court’s attention by attorneys for defendants at the time of the argument of said motion, and that said decision was not then in mind by the court; now, therefore, in view of the premises

“It is ordered, That the defendants’ motion for a new trial herein be, and the same hereby is granted, solely upon the authority of the case of *Konick vs. Champney*.”

It is a case wherein the trial court, after disposing upon its merits of a motion for a new trial pending at the time of the entry of judgment, which entry had been stayed because of a motion for judgment *non obstante veredicto*, thereafter reconsidered and con-

cluded there was error in the first ruling. The reconsideration came after a motion to the same effect had been denied and after the entry of judgment. We are satisfied that, after the denial of the motion for a new trial filed within two days after the verdict of the jury, and after the proper entry of judgment in the case, a trial judge is without jurisdiction to again consider a like motion, based upon the same grounds, and make another order in the case. Such is the rule announced in the case of *Burnham v. Spokane Mercantile Co.*, 18 Wash. 207, 51 Pac. 363. In fact, we do not understand counsel for respondents to contest this proposition, but only insist it is not applicable in this case for the reason the judgment had not been properly entered by the clerk. We have seen, however, the judgment was properly entered, and hence the application of the rule in the *Burnham* case.

Counsel for respondents insist upon a consideration of the complaint as tested by their motion to separately state, and their demurrer that two causes of action were improperly united. We decline the consideration thereof because limited to those matters complained of by the appellant. There is no cross-appeal by the respondents.

Reversed and remanded to the trial court with direction to set aside the order granting the respondents' motion to set aside the judgment, and also to set aside the order of December 18, 1919, vacating and setting aside the order of November 7, 1919, denying the motion for a new trial.

HOLCOMB, C. J., PARKER, MACKINTOSH, and MAIN, JJ., concur.

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Statement of Case.

[No. 15850. Department Two. August 18, 1920.]

FRANK HINKHOUSE *et al.*, Respondents, v. C. WACKER
et al., Appellants, INLAND EMPIRE LAND
COMPANY, Intervener.¹

HUSBAND AND WIFE (69)—COMMUNITY PROPERTY—LEASE BY HUSBAND ALONE—VALIDITY. An unacknowledged lease of community property, signed by the husband alone, is good only for one year.

LANDLORD AND TENANT (134)—ACTION FOR UNLAWFUL DETAINER—NOTICE TO QUIT—SERVING AND MAILING OF NOTICE. The service of a notice to quit by leaving a copy at the premises with some person of suitable age and discretion is insufficient unless a copy be sent through the mail addressed to the person entitled thereto at his place of residence, as provided by Rem. Code, § 814.

SAME (135)—NOTICE TO QUIT—TIME OF SERVICE. A notice to a tenant to quit and surrender possession of premises at the end of the yearly tenancy is sufficient to support an action for unlawful detainer.

SAME (136)—NOTICE TO QUIT—SUCCESSIVE NOTICES—WAIVER. The giving of an insufficient notice to quit is not a waiver of prior notices.

ESTOPPEL (48, 54)—LANDLORD AND TENANT (12)—RATIFICATION OF INVALID LEASE. The lessor of premises under an invalid lease for a term of years is not estopped to deny that the lease was valid for more than one year because he sold horses, feed and grain to the lessee at the time of and after execution of the lease, it appearing that the purchases were an accommodation to the lessee in farming the land the first year, and were not a part consideration for the lease.

CHATTEL MORTGAGES (3)—PROPERTY SUBJECT—CROPS ON LEASED PREMISES. A mortgagee of crops to be grown on leased premises, who had knowledge that the lessor had served notice terminating the lease for that year, can claim no greater right to the crops than the lessee, since he was not an innocent mortgagee.

Appeal from a judgment of the superior court for Grant county, Hill, J., entered October 28, 1919, in favor of the plaintiff, in an action of unlawful detainer, tried to the court. Affirmed.

¹Reported in 191 Pac. 881; 195 Pac. 218.

F. A. McMaster, for appellants.

Dr. P. Barrows and *Barrows, Hanna & Lebeck*, for respondents.

MOUNT, J.—This is an action of unlawful detainer, brought for the possession of 1,530 acres of farm land in Grant county. When the action was begun, a writ of restitution was issued and the plaintiff was put in possession of the property. Upon the trial of the case, the court found in favor of the plaintiff and entered a judgment accordingly. The defendant has appealed.

It appears that, on the 6th day of December, 1917, respondent desired to let the farm in question for a period of one year. The appellant desired to lease the lands for a period of six years. After some consultation it was agreed that a lease for six years might be entered into. The respondent himself prepared a lease providing that the appellant C. Wacker should have the property for a period of six years beginning February 5, 1918. The lease provided, among other things, that the lessor should be entitled to one-third of the crop and the land should be farmed in a workmanlike manner to the satisfaction of the lessor. The lease was signed by the respondent Frank Hinkhouse and by the appellant C. Wacker. It was not signed by Mrs. Hinkhouse and was not acknowledged by any of the parties. After the lease was executed, the appellant paid \$2,000 to the respondent for the purpose, he says, of binding the bargain. At the time the lease was entered into, it was agreed that the respondent Hinkhouse should sell to Mr. Wacker certain horses, feed and seed which were then on the premises. This \$2,000 was applied upon the purchase of the horses, seed and feed. The appellant, that same year, purchased farm machinery, etc., to the extent of about

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\$14,000. During the first year of the lease the parties had some difficulty. After the lease had been signed by Mr. Hinkhouse, Mrs. Hinkhouse refused to sign it. She thereafter repeatedly refused to sign it. In the fall of 1918, namely, on September 5, a notice as follows was served upon Mr. Wacker:

“Ruff, Washington, September 4, 1918.

“To Conrad Wacker:

“Take notice that you are hereby requested to quit and deliver up to me the possession of the premises now held and occupied by you under the contract entered into by myself and you on the 8th day of December, 1917. (Then follows a description of the premises.) This notice is intended as notice to quit at end of year. However, it is not intended to waive any rights that I may have for redress on account of your not complying with contract, and I hereby ask you to give me my share of crop due me.

“(Signed) Frank Hinkhouse.”

Thereafter, in October, the following notice was served upon the appellant Wacker:

“Ruff, Washington, October —, 1918.

“To Conrad Wacker and his wife:

“You are here required to pay the balance of my share of rent of the premises described hereinafter and which you now hold and give me an accounting of said crop within three days after service of this notice, as required by law, or deliver up to me the possession of said premises. (Then follows a description of the premises.)

“(Signed) Frank Hinkhouse, Landlord.”

After this last notice was served, an action was brought by respondent against the appellant to recover rent alleged to be due and damages for breach of contract. While that action was pending, another notice was served in the month of February, 1919, upon Mrs. Wacker, as follows:

"To Conrad Wacker and Mrs. Conrad Wacker, his wife:

"You, and each of you, are hereby notified and required to vacate and surrender to the undersigned, Frank Hinkhouse and Mrs. Frank Hinkhouse, his wife, the following described lands and premises in Grant county, state of Washington. (Then follows a description of the land.)

"(Signed) Frank Hinkhouse,

"(Signed) Mrs. Frank Hinkhouse,

"By O. P. Barrows, their Agent and Attorney."

This notice was served upon Mrs. Wacker on the 25th day of February, 1919. It was not served upon Mr. Wacker because he was away from home. A copy was left with Mrs. Wacker to be delivered to her husband. Thereafter this action was begun for restitution of the premises, and resulted as we have above stated.

The appellant apparently makes no claim that the lease is valid for the full term, but insists that he is entitled to the possession of the premises for the year 1919, because in September of 1918 he sowed 320 acres of wheat upon the premises. This wheat was sown after appellant had notice that he would be required to vacate at the termination of the first year. This court in a number of cases has held that an unacknowledged lease of community property is good only for one year. In *Spreitzer v. Miller*, 98 Wash. 601, 168 Pac. 179, a number of cases so holding are cited, and we there said:

"Hence it has consistently been held that a contract to lease community land, made by a married man without his wife joining him in the manner provided by the last quoted section, the lessee knowing of its community character, is clearly in contravention thereof."

It follows from what we said in that case that the lease in this case was valid only for the year 1918.

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The appellant seriously contends that the giving of the last notice on February 25, 1919, is a waiver of the other notices. We are of the opinion that this would be correct if the last notice was sufficient. We are of the opinion that the notice last given was of no effect because it was not served in the manner provided by law. Section 814, Rem. Code, provides that such notice "shall be served either (1) by delivering a copy personally to the person entitled thereto; or (2) if he be absent from the premises unlawfully held, by leaving there a copy, with some person of suitable age and discretion, and sending a copy through the mail addressed to the person entitled thereto at his place of residence; . . ." In the case of *Smith v. Seattle Camp No. 69, W. O. W.*, 57 Wash. 556, 107 Pac. 372, we held that, under this provision, where personal service could not be had upon the lessee, the two acts, viz., leaving the notice with a suitable person and mailing, must concur to make a valid service. It is plain, therefore, that the last notice given was ineffective by reason of the fact that the statute was not complied with in respect to mailing the notice. The second notice that was given was a notice to pay the rent or to deliver up possession of the premises. That notice was served for the purpose of bringing an action for the recovery of rent and for possession of the premises on account of violation of the terms of the lease. The action based thereon was not brought as an unlawful detainer action. That action was dismissed by the respondent before the present action was tried.

It is also argued by appellant that the first notice was insufficient. In the case of *Smeltzer v. Webb*, 101 Wash. 568, 172 Pac. 750, a case of this kind, we held that an oral notice, given before the end of the year, demanding surrender of possession of a farm was suf-

ficient. In that case Judge Parker, speaking for the court, said:

"This is not a case of giving a statutory notice to quit looking to the termination of a tenancy, but it is a case of preventing the commencement of a new tenancy, or rather of preventing the renewal by consent of a tenancy which, by express terms of the contract creating it, expired on a specified date. We conclude that the trial court did not err in admitting testimony of the making of the oral demand for possession by respondents."

If an oral demand for possession is sufficient before the expiration of a yearly lease, clearly the notice given in this case was sufficient for the same purpose. We are of the opinion, therefore, that the first notice was sufficient upon which to base the action for unlawful detainer. We are also of the opinion that the giving of the subsequent notices did not amount to a waiver of the first notice.

The appellant also contends that the respondents are estopped to question the validity of the lease for the second year because of the purchase of horses, feed and grain by the appellant from the respondent at the time and after the execution of the contract of lease. We find nothing in the evidence to indicate that the purchase of the horses and the grain and feed was a part consideration for the lease, but it appears that the purchase of the horses and the feed and the seed was an accommodation to the lessee in farming the land for the year 1918. In the case of *Armstrong v. Burkett*, 104 Wash. 476, 177 Pac. 333, this court said upon the question of estoppel:

"To make an oral lease good for one year under the theory of estoppel there must be some element of benefit to the landlord aside from the rent reserved, or some injustice to the tenant that a court of equity will not tolerate, as, for instance, where the landlord has

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made the lease conditioned upon some alteration or improvement that would enhance the value of the property, or where the value of the property lies in the taking of an annual crop. In other words, the mere possession, the payment of rent and the conduct of a business in the usual way and for the sole benefit of the tenant, unaccompanied by circumstances which will create a consideration going to the term, will not make an oral lease from month to month a term lease resting in estoppel."

The case of *Andersonian Investment Co. v. Wade*, 108 Wash. 373, 181 Pac. 861, relied upon by appellant, was a case where the lessee had been authorized to make improvements to a building by written consent of the agent and where the lessee had made the improvements at his own cost. That was a case where the improvement enhanced the value of the building, and within the exception to the rule as stated in the *Armstrong* case, *supra*.

Appellant further argues that the intervener in this case is entitled to consideration. The facts in that respect are that, after respondent had notified appellant his lease would terminate on the 5th of February, 1919, the intervener loaned money or sold seed to the appellant and took a chattel mortgage on the crop which was to be grown during the year 1919. It appears from the evidence that the intervener knew of the relation existing between the appellant and respondent, and we are satisfied for that reason he could not claim to be an innocent mortgagee and have a greater claim upon the crops than the appellant himself.

We are satisfied, upon the whole case, that the trial court arrived at the correct conclusion. The judgment is therefore affirmed.

HOLCOMB, C. J., BRIDGES, and TOLMAN, JJ., concur.

ON REHEARING.

[*En Banc*. February 9, 1921.]

PER CURIAM.—Upon rehearing *En Banc* and a careful reconsideration of the whole subject-matter, the majority of the court adheres to and affirms the views heretofore expressed in the above opinion.

The judgment is affirmed.

[No. 15696. Department Two. August 23, 1920.]

EUGENE R. McCLAIN *et al.*, *Appellants*, v. THE
SUPERIOR COURT FOR CHELAN COUNTY,
Wm. A. Grimshaw, Judge,
Respondent.¹

ADOPTION—INFANTS (3)—CUSTODY OF DELINQUENTS—JURISDICTION OF COURTS—STATUTES—CONSTRUCTION. The superior court has jurisdiction to hear a petition for the adoption of a child after its permanent custody was awarded to a society by order of the juvenile court, with power to consent to adoption of the child, as provided by Rem. Code, §§ 1987-1, 1987-9, 1987-10 and 1700, notwithstanding the juvenile court act provides for the continuing jurisdiction of the court, since the juvenile court intended and had power to completely release itself of jurisdiction over the child.

Appeal from an order of the superior court for Chelan county, Grimshaw, J., entered October 30, 1919, denying a petition for the adoption of a minor. Reversed.

L. J. Nelson and Herman Howe, for appellants.

BRIDGES, J.—In August, 1918, Mollie Hodel became a ward of the juvenile court of Clarke county, Washington. In January, 1919, that court awarded the temporary custody and control of the child to the Washington Children's Home Society, of Seattle, Washing-

¹Reported in 191 Pac. 852.

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ton. In March, 1919, the juvenile court made a judgment ordering that the said minor "be and hereby is committed to the permanent custody of the Washington Children's Home Society, of Seattle, Washington, and the said society is hereby authorized and empowered to consent to the adoption of the said child by such person or persons as shall, by the said society, be found competent and desirous of so doing." Thereafter the society entrusted to the appellants Eugene R. McClain and Minnie G. McClain, his wife, the temporary care, custody and control of the child. The appellants are residents of Chelan county, Washington. In August, 1919, they presented to the superior court of that county their petition for the adoption of said minor. The petition for adoption recited, in substance, the facts here set out, and attached thereto was the written consent of the Washington Children's Home Society for the legal adoption of the child by the appellants. Thereafter the father and mother of the child were duly brought into the adoption proceedings by publication of notice, as provided by law in such cases.

On October 30, 1919, the Chelan county court, upon reading the petition for adoption, made an order dismissing the petition for want of jurisdiction, such order being in part as follows:

"The court now finds from said petition that it is without jurisdiction to grant the relief prayed for, for the reason that the juvenile court of Clarke county, Washington, has continuing jurisdiction of said Mollie Hodel, a minor child; for which reason the court declines to consider or pass upon the said petition. It is therefore ordered, adjudged and decreed that said petition be and the same is hereby denied. . . ."

The appeal is from this order.

The only question for our determination is whether the superior court of Chelan county has jurisdiction to hear this petition.

Section 1987-1, Rem. Code, being a part of the juvenile court law, provides that, for the purpose of the act, all delinquent and dependent children within the state shall be considered wards of the state, and their persons shall be subject to the custody, care, guardianship and control of the court. Section 1987-8 provides that the juvenile court may at any time make an order committing any delinquent or dependent child

“to some suitable institution, or to the care of some reputable citizen of good moral character, or to the care of some training school or industrial school as provided by law, or to the care of some association willing to receive it, embracing in its objects the purpose of caring for or obtaining homes for dependent, neglected or delinquent children; provided such order may be temporary or permanent in the discretion of the court, and may be revoked or modified as the circumstances of the case may thereafter require.”

Section 1987-9 provides that, where the court shall award a child to any such person or association, such child shall become the ward and subject to the guardianship of such association or person, and that “such association shall have authority, with the assent of the court, to place such child in a family home, either temporarily or for adoption.” This section further provides that the court may, under certain circumstances, make a decree of adoption transferring to any suitable person all the rights of the parent or guardian to such child, and that

“The jurisdiction of the court shall continue over every child brought before the court, or committed pursuant to this act, and the court shall have power to order a change in the care or custody of such child, if at any time it is made to appear to the court that it

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would be for the best interests of the child to make such change."

Section 1987-10 provides, among other things, that, "After acquiring jurisdiction over any child, the court shall have the power to make an order with respect to the custody, care or control of such child, or any order, which in the judgment of the court, would promote the child's health and welfare. . . . Or the court may commit the child to the care and custody of some association that will receive such child, . . ."

Section 1987-14 provides that the act shall be liberally construed to the end that its purpose may be carried out, and that,

"In all cases where it can be properly done, the dependent or delinquent child, as defined in this act, shall be placed in an approved family and may become a member of the family by adoption or otherwise."

Section 1987-15 provides that

"Any order made by the court in the case of a dependent or delinquent child may at any time be changed, modified or set aside, as to the judge may seem meet and proper."

Section 1700, Rem. Code, provides that

"Any benevolent or charitable society, incorporated under the laws of the state for the purpose of receiving, caring for, or placing out for adoption, or improving the condition of orphaned, homeless, neglected or abused minor children, . . . shall have authority to receive, control and dispose of children under eighteen years of age . . ."

and that such corporation shall have authority to consent to the adoption, under the laws of the state of Washington, of such child.

The purpose of the juvenile court act is the welfare of dependent or delinquent children, and its various provisions should be construed with that purpose in

view. In the instant case, the juvenile court of Clarke county awarded this child permanently to the Washington Children's Home Society, with authority and power to consent to its adoption by any suitable person. To hold that, by this act, the juvenile court did not release all of its jurisdiction over the child would be, in substance, to hold that such court had no power to release its jurisdiction during the minority of the child. Such a construction would, it seems to us, manifestly be in violation of the spirit and purpose of the act. Certainly, the juvenile court could consent to the legal adoption of its ward or to its marriage, and, under those circumstances, the court must of necessity lose its jurisdiction over the child. If it can do these things and lose its jurisdiction, it can surrender the entire control of the child to a society incorporated for the purpose of receiving such children and finding homes for them. Unquestionably the Clarke county court, by its order giving to the society the permanent custody and care of this child, and authority to consent to its legal adoption, intended thereby to relieve itself of any further obligation to the child and to rid itself of all jurisdiction as a juvenile court over it.

Indeed, the juvenile court laws expressly authorize the court to do the very thing which it has done in this instance, for it is provided that "such association shall have authority, with the consent of the court, to place such child in a family home, either temporarily or for adoption." § 1987-9. The fact that the act provides generally that the court shall not lose jurisdiction, but shall have power and authority to review or rescind any order theretofore made concerning the welfare of the child, does not violate the idea that such court may, if it see fit and under proper circumstances, entirely rid itself of jurisdiction. The idea of the legis-

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lature was that the court should retain jurisdiction under all circumstances to administer to the needs and for the protection of the child, but this does not mean that the court may not, in the exercise of its discretion, permanently dispose of the child so as to entirely lose jurisdiction of it. But if the juvenile court has retained jurisdiction and the consent to the adoption must be obtained, we find such consent in the order awarding the child to the society and authorizing it to consent to the adoption by suitable persons.

The case of *State ex rel. De Bit v. Superior Court*, 103 Wash. 183, 173 Pac. 1014, is not contrary to the conclusion to which we have come, for in that case the court made an order for the custody of the child, but reserved jurisdiction of and control over it.

Nor is the case of *In re Chartrand*, 103 Wash. 36, 173 Pac. 728, in point. In that case the child was a ward of the juvenile court of Chelan county, and that court made an order temporarily placing the child in the care, custody and control of the House of the Good Shepherd, in the city of Seattle, Washington. Later the child petitioned the superior court of Chelan county for a writ of habeas corpus. That court refused jurisdiction because the child was no longer within Chelan county. Thereafter a similar petition was presented to the superior court of King county, which held that it was without jurisdiction. On an appeal from both of these judgments, this court held that the Chelan county court had jurisdiction and that the King county court had not.

Nor is the case of *In re Rising*, 104 Wash. 581, 177 Pac. 351, in point.

No decision of this court has been cited, nor have we found one, involving the question here for decision. Our conclusion is that the superior court of Chelan

county has jurisdiction of this petition and that it was in error when it refused to hear it.

The judgment is reversed, and the cause remanded with directions to that court to proceed to the hearing of the petition for adoption.

HOLCOMB, C. J., TOLMAN, MOUNT, and FULLERTON, JJ., concur.

[No. 15836. Department Two. August 23, 1920.]

C. R. HARRILD, *Respondent*, v. SPOKANE SCHOOL DISTRICT, *Appellant*.¹

JURY (4) — RIGHT TO JURY TRIAL — LEGAL OR EQUITABLE ACTION. An action to recover a sum of money, in which the defense was lack of indebtedness because of non-compliance with the contract, is strictly a law action and triable by a jury.

EVIDENCE (83) — DEMONSTRATIVE EVIDENCE — MODELS — DISCRETION OF COURT. In an action to recover the price of school desks manufactured for the defendant, it is discretionary to refuse to allow defendant to display other desks for comparison, it not being shown that the model desks were of the same quality or character as those delivered.

CONTRACTS (144) — SUBSTANTIAL PERFORMANCE — MANUFACTURE OF CHATTELS FOR SPECIAL USE. The doctrine of substantial performance applies to contracts for the manufacture of chattels according to plans and specifications, for a special use.

SAME (144) — SUBSTANTIAL PERFORMANCE — INSTRUCTIONS. In an action for the price of school desks manufactured according to plans and specifications in which the court instructed that plaintiff could recover if he had tried to follow the plans and specifications and the desks delivered were substantially as required by the contract, it is not error to refuse a requested instruction that the plans and specifications were a part of the contract and that plaintiff must show by a preponderance of the evidence that he complied strictly with the contract.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered November 4,

¹Reported in 192 Pac. 1.

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1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Joseph B. Lindsley and Fred J. Cunningham, for appellant.

Plummer & Lavin, for respondent.

BRIDGES, J.—The respondent entered into a contract with the appellant whereby he agreed to manufacture and deliver twenty-four drawing tables and twenty-four drawing desks, which the appellant desired to use in the fine arts and mechanical drawing department of one of the schools in the city of Spokane. The contract price for the tables was \$253, and for the desks, \$628. The contract provided that the respondent should manufacture these articles in accordance with certain plans and specifications furnished to him. In due course, the articles were delivered to the appellant, which refused to accept or pay for them on the ground that they were defective and were not constructed in accordance with the contract. Thereupon the respondent sued for the contract price, and the appellant defended on the grounds above indicated. There was a verdict for the respondent and judgment was entered thereupon, from which this appeal is taken. The appellant's motions for nonsuit, for judgment notwithstanding the verdict, and for a new trial were denied.

Appellant first contends that its demand that the case be tried by the court without a jury, or, if tried by a jury, that its verdict be considered advisory only, should have been granted. It seems to us that the case is strictly one of law and not one of equity. The purpose of the action was to recover a sum of money; the defense was, in substance, that there was no indebtedness to the respondent because the latter had not complied with the contract. We are satisfied the court was

right in ruling that the case was one triable by a jury.

One of the chief questions involved was whether or not the manufactured articles were constructed in accordance with the plans and specifications and were of good workmanship. During the trial the appellant asked permission to display before the jury not only the articles in question, but also other manufactured desks to be used as models for comparison purposes. The court permitted only the articles in dispute to be shown to the jury, and refused the remainder of appellant's request. We do not find any reversible error in this. The appellant did not indicate the kind of model desks he desired for comparison purposes. It was not shown whether they were finished or unfinished, whereas those involved in this action were not painted nor varnished. It was not shown that the model desks were to be of the same kind, quality and character as those involved in this action. In any event, it was entirely discretionary with the trial court whether it would permit these comparisons.

The chief argument presented to this court for the reversal of the case is based on the instructions to the jury. The court, in substance, instructed that, if the respondent had honestly and faithfully tried to follow and comply with the plans and specifications, and that the tables and desks were substantially as required by the contract, then the respondent would be entitled to maintain his action. In other words, the theory of the trial court was that a substantial compliance was all that the law required. The appellant seems to admit that, in building contracts, a substantial compliance is sufficient, but contends that the rule does not apply to articles manufactured for a special purpose, as in this case. In other words, it takes the position that there must be a strict compliance of a contract for the manufacture of a chattel for a specific use.

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The common law required a strict compliance with the terms of all contracts. Later, however, it was realized that this strict rule was liable to, and often did, work a great injustice, and at a somewhat early period the equity courts began to work a relaxation of the common law rule. Following the lead of equity, the law courts soon began to recognize the justness of the substantial compliance rule and first applied it to building contracts, and at the present time it is almost universally held that a substantial compliance is sufficient in such contracts. This court has long since adopted and followed this rule. *Mortimer v. Dirks*, 57 Wash. 402, 107 Pac. 184; *Windham v. Independent Tel. Co.*, 35 Wash. 166, 76 Pac. 936; *Schmidt v. North Yakima*, 12 Wash. 121, 40 Pac. 790. But the question in this case is whether the substantial compliance doctrine should apply to a contract such as is involved here. It must be admitted that the decisions of the courts are not altogether harmonious on this question.

It is argued that the strict compliance rule of the common law has been relaxed by the courts in building contracts because in those instances the construction is upon the land of another and cannot be removed, and that it would be unjust, under those circumstances, to require one who has substantially but not strictly complied with the contract, to lose all of his work and material. But this same reason would equally apply to contracts for the manufacture of chattels for special use, for, while the manufacturer may carry away the article, it is of but little, if any, use or value to him. He will have lost his material and work in the one instance almost to the same extent as in the other. In equity, the substantial compliance rule is applied to almost all contracts and the party is permitted to recover as for a completed performance, less such dam-

ages as the other party may have been put to by reason of the matters not performed. 13 C. J. 691; 9 Cyc. 601. If justice requires the doctrine of substantial performance to be applied to building contracts, we see no good or logical reason why it should not, on the same grounds, be made applicable to contracts of the character here involved. At page 966, vol. 6, R. C. L., it is said:

“By the common law, a party to a contract was compelled to show a literal performance of the stipulations of it before he could claim damages for a nonperformance against the other. Expressions in some of the more recent cases seem to indicate a tendency to relax the rigor of this rule. Thus, it is said that the law looks to the spirit of a contract and not the letter of it, and that the question therefore is not whether a party has literally complied with it, but whether he has substantially done so. Other courts have said that substantial, and not exact, performance, accompanied by good faith, is all the law requires in the case of any contract to entitle a party to recover on it. Although a plaintiff is not absolutely free from fault or omission in every particular, the court will not turn him away if he has in good faith made substantial performance, but will enforce his rights on the one hand, and preserve the rights of the defendant on the other, by permitting a recoupment. Such statements would appear to be especially applicable to cases in which, in view of the nature of the contract, a substantial compliance must have been contemplated by the parties.”

See, also, 13 C. J. 690.

In the case of *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19, 16 Atl. 36, it is said:

“The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contract in all material and substantial particulars, so that their right to compensation may not be

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forfeited by reason of mere technical, inadvertent or unimportant omissions or defects."

In the case of *Meincke v. Falk*, 61 Wis. 623, 21 N. W. 785, the contract was for the construction of a carriage like another carriage which was to be used as a model. It appears that, although the carriage, when constructed, was as good as the model carriage and was substantially the same, yet there were minor and unimportant differences. On this account the defendant refused to accept the manufactured article. It was held that the trial court was in error in taking the case from the jury. The court said:

"To say that the parties intended that the two carriages should be precisely alike in every unimportant particular, that there should not be the least difference between them in any part, however slight, would be placing upon the language used a forced and unreasonable construction. It is impossible for any mechanic to make even two spokes precisely alike, so that a glass, or possibly the naked eye, cannot detect some slight difference between them."

The case of *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309, was one concerning the erection of a building upon the premises of another, but the language of the court is sufficiently broad to be applicable to cases of this character. The court said:

"In many cases, such as building contracts, notwithstanding the most honest, diligent and intelligent effort to fully perform in every particular, yet, owing to oversight, inadvertence, or some excusable mistake, very often some slight omissions or defects may be discovered. To hold that a builder could not in any such case recover on his contract would be too rigid a rule to apply to the practical affairs of life. Substantial performance is all that reason or the law requires. Literal compliance in every detail is not required. This is the rule applicable to contracts generally."

At page 2147, vol. 3 of Page on Contracts, it is said:

"The doctrine of substantial performance is by no means limited to building contracts. If any contract is performed substantially, recovery can be had thereon subject to recoupment of damages, if any."

To the same general effect see the following cases: *Newport v. Newport etc. Bridge Co.*, 90 Ky. 193, 13 S. W. 720, 8 L. R. A. 484; *Peterson v. Mayer*, 46 Minn. 468, 49 N. W. 245, 13 L. R. A. 72; *Foeller v. Heintz*, 137 Wis. 169, 118 N. W. 543, 24 L. R. A. (N. S.) 327, and note.

The appellant cites 23 R. C. L., page 1418, as laying down the rule of strict performance. There it is said:

"Where the contract is for the sale of unidentified property or property not in existence, and the contract requires that it be of a certain character or quality, the requirement as to quality, etc., is not a mere warranty, but a condition precedent to a valid tender by the seller, and if the property is not of the kind called for by the contract there is no obligation on the buyer to accept; and this is true though the article is one which was to be specially manufactured by the seller. In the latter case the doctrine of substantial performance with allowance to the buyer of a deduction with respect to the matter in which the article falls short of the requirements called for by the contract is not to be applied."

But this is said with reference to sales and is not applicable to contracts of the nature of the one at bar. The case of *Springfield Shingle Co. v. Edgecomb Mill Co.*, 52 Wash. 620, 101 Pac. 233, 35 L. R. A. (N. S.) 258, cited and greatly relied upon by the appellant, is such an instance as is referred to in the last quotation from Ruling Case Law. In that case one party agreed to sell, and the other to buy, "Star-A-Star" grade of shingles. The manufacturer, however, furnished an inferior grade of shingles of much less value, and the

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court held that the purchaser was not required to take them. It seems hardly necessary to point out the many distinctions existing between that case and this one. It seems to us not to be in point in any regard.

We are prepared to hold, and do hold, that the doctrine of substantial performance applies not only to building contracts, but to all contracts for the construction of chattels according to plans and specifications, for a special use.

The appellant complains that the court erred in not giving its requested instruction No. 3, reading as follows:

"You are instructed that the plans, drawings and specifications are a part of the contract which the plaintiff and defendant entered into for the manufacture and sale of the articles of furniture mentioned therein, and the plaintiff must show by a preponderance of the evidence in this case that he complied strictly with said contract, drawings and specifications in all material particulars in the manufacture of said articles before he can recover herein."

We think this request is, in substance, the same as the instructions given by the court, for it has been held that:

" 'Substantial performance' means strict performance in all essentials necessary to the full accomplishment of the purposes for which the thing contracted for was designed. Failure as to any of such features, whether in good faith or bad faith, any departure from the contract, not caused by inadvertence, or unavoidable omission, any defect so essential 'as that the object which the parties intended to accomplish to have a specified amount of work performed in a particular manner is not accomplished,' is inconsistent with substantial performance of the contract." *Manning v. School District No. 6*, 124 Wis. 84, 102 N. W. 356.

In fact, some of the courts hold that substantial performance means full performance according to the fair

intent of the parties. 13 C. J. 691, and cases cited.

We think the court properly submitted the case to the jury. The judgment is affirmed.

HOLCOMB, C. J., TOLMAN, MOUNT, and FULLERTON, JJ., concur.

[No. 15849. Department Two. August 23, 1920.]

D. H. KING, *Appellant*, v. THE STATE OF WASHINGTON,
Respondent.¹

CONTRACTS (141) — BUILDING CONTRACTS — OPTIONAL USE OF FIXTURES—WITHHOLDING APPROVAL BY ARCHITECT—EXTRA COST. The extra cost of installing fixtures specified in a building contract may be recovered, where the contract allowed the contractors to install other fixtures of equal make and made the architects arbitrators, and officers in charge of the building refused to allow the change or permit the architects to approve thereof, which they would have done if allowed to exercise their independent judgment.

SAME (141). In such a case, the contractor's right of recovery is not affected by a provision of the contract to the effect that no deviation from the drawings or specifications should be made without the written consent or approval of the officers in charge of the building, since there was no deviation attempted, but only the authorized substitution of one make of goods for another.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered November 19, 1919, upon findings in favor of the defendant, dismissing an action on contract, tried to the court. Reversed.

Wm. E. Froude (*Hyman Zettler*, of counsel), for appellant.

The Attorney General and Fred J. Cunningham, Assistant, for respondent.

BRIDGES, J.—The plaintiff, D. H. King, entered into a contract with the state of Washington to furnish all material and install the plumbing for the northern

¹Reported in 192 Pac. 15.

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hospital for the insane. The contract provided, among other things, as follows:

"Baths: Continuous baths, Clow & Sons, P. 2215, with control table, two baths being controlled from one table.

"Catalogue numbers given in this specification designate the kind and quality of fixtures desired, but goods of other reputable manufacturers of equal make and functions may be used. The fixtures to be used shall be submitted to the architects for their approval within thirty days after signing the contract.

"Contractor may provide manufactures of fixtures other than those specified, but must first submit catalogue numbers and samples to the architects for their approval.

"No deviation from the drawings or specifications shall be made in the execution of the work without the written approval of the board of control."

It was further provided that the contractor shall do "to the satisfaction of the architects everything required by the drawings, specifications and general conditions."

The plaintiff desired to install the Crane Company's continuous baths, which he could buy for \$1,200 less than Clow & Sons baths would cost him, and which he contended were equal to the Clow baths. He was required, however, to, and did, install the Clow baths, and brought suit to recover the difference in cost, to wit, \$1,200.

There is no dispute in the record that the plaintiff was required to pay \$1,200 more for the Clow & Sons baths than he would have been required to pay for the Crane Company's baths. The court, to whom the case was tried without a jury, found, in addition to the facts as above recited, that neither the architects nor the state board of control had approved of the Crane Company's baths, nor consented to the installation of the

same in lieu of those of Clow & Sons, but, on the contrary, directed that the last named baths be installed by the plaintiff. Based upon these findings, the court made a judgment dismissing the action. The plaintiff has appealed.

The testimony conclusively shows that the architects believed that the Crane Company's baths were equal to the Clow & Sons baths and were satisfied that the former might be installed in place of the latter, and that they refused to give their consent for such installation because the board of control and the superintendent of the hospital refused their consent; and the great weight of the testimony shows that the Crane Company's baths were made by a reputable manufacturer and were of "equal make and function" with the Clow baths.

We are satisfied that the learned trial court was in error in not entering a judgment in favor of the appellant for the amount sued for. Under the terms of the contract it was for the architects, and for them only, to determine whether or not the Crane baths were equal to and would give as good satisfaction as the Clow baths, and in reaching such determination they were bound to use their own impartial and independent judgment. They were not permitted to give their consent to the substitution only on condition that a like permission be obtained from the board of control. They were, in this regard, arbitrators and the agents of both parties to the contract, and the contractor had an absolute right, not only to rely upon the decision of the architects, but to insist that such decision be a fair and impartial one, and one not controlled by the desires of the board of control or the superintendent of the hospital. It is beyond dispute in this case that, had the architects acted upon their own independent

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judgment, they would readily have consented to the installation of the Crane baths. Indeed, under the testimony, which shows almost conclusively that the Crane baths are equal to those of Clow & Sons, it would have been their duty to have permitted the installation of the Crane baths. The right given by the contract to appellant to have the architects decide this question was a valuable one. To now say that he must abide the consent of others would be to deprive him of that right and change the terms of the contract to his detriment.

In the case of *Camp v. Neufelder*, 49 Wash. 426, 95 Pac. 640, 22 L. R. A. (N. S.) 376, the contract had reference to the furnishing of certain sidelights and provided that "these lights shall be of the W. B. Jackson make or equal," and that the work of the contractor must be to the satisfaction of the architect, who had the right to approve or reject any and all work. The contractor desired to use some light other than the Jackson make, but one which he contended was equally good. The architect refused to examine or consider the installation of other lights, but arbitrarily insisted upon the Jackson lights. These the contractor installed, and later sued for his damages. We held that the mere fact that the contractor had, upon demand, installed the Jackson lights did not deprive him of the right to maintain his suit. We further said:

"While it is true that the contractors were bound to perform to the satisfaction of the architect, yet it is equally true that they had a right to demand that he exercise an independent and honest judgment, and that he should not arbitrarily refuse to consider or determine matters submitted to his judgment. If the contractors did in fact produce lights equal to the W. B. Jackson light they had the right not only to install them, but the right to have the architect's approval of them before they were installed, and it was the archi-

tect's duty to give them the benefit of his honest judgment in passing upon the character of the lights produced."

See, also, the following cases: *Northwestern Marble & T. Co. v. Megrath*, 72 Wash. 441, 130 Pac. 484; *Boettler v. Tendick*, 73 Tex. 488, 11 S. W. 497; *Boston Store v. Schueter*, 88 Ark. 213, 114 S. W. 242.

The respondent greatly relies upon that provision of the contract, above quoted, to the effect that no deviation from the drawings or specifications should be made without the written consent or approval of the board of control. But that provision does not help it. It refers to an entirely different matter to the one involved here. Here there were no deviations; there was only the attempted substitution of one make of bath for another, a thing which the contract permitted.

We have no doubt that, under the testimony, the plaintiff should have been allowed to recover. The judgment appealed from is reversed, and the cause remanded with instructions to the trial court to set aside the judgment entered by it and to enter a judgment in favor of the appellant for the sum sued for.

HOLCOMB, C. J., TOLMAN, MOUNT, and FULLERTON, JJ., concur.

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Opinion Per TOLMAN, J.

[No. 15838. Department One. August 23, 1920.]

EDWARD MOLITOR, *Appellant*, v. BLACKWELL MOTOR
COMPANY *et al.*, *Respondents*.¹

NEW TRIAL (37)—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE. The refusal to grant a new trial on the ground of newly discovered evidence will not be disturbed, where the affidavits in support of the motion showed merely a corroboration of the matters testified to by appellant's witnesses, and the court is satisfied that there was no abuse by the court in the exercise of its discretion.

MUNICIPAL CORPORATIONS (384, 392)—STREETS—COLLISION WITH AUTOMOBILE—PROXIMATE CAUSE—INSTRUCTIONS. In an action for injuries sustained by a bicyclist struck by an automobile, a requested instruction that violation of an ordinance in making a turn was the proximate cause of the injury, even though no headlight was burning on the bicycle, is properly refused, it being for the jury to determine whether failure to carry a light was the proximate cause.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered December 6, 1919, upon the verdict of a jury rendered in favor of the defendants, in an action for personal injuries. Affirmed.

Robertson, Miller & Robertson, for appellant.

McCarthy & Edge, for respondents.

TOLMAN, J.—This action was brought to recover for personal injuries sustained by the appellant, plaintiff below, in a collision between a bicycle ridden by him and an automobile belonging to the defendant, who is respondent here. The case was tried to a jury, which rendered a verdict for the defendant, and this appeal is from a judgment thereon.

The errors assigned and relied upon are: (1) Denial of a motion for a new trial; and (2) the giving and refusing of instructions to the jury.

¹Reported in 191 Pac. 1103.

The motion for a new trial, among other grounds, is based upon newly discovered evidence, which is the only ground urged here, and supported by an affidavit showing that such evidence relates solely to the question of whether or not the appellant had a headlight burning on his bicycle, such as was required by the ordinance of the city of Spokane, at the time of the accident.

This question was made a direct issue by the pleadings and was one of the principal issues at the trial. Appellant testified that he had such a headlight, properly equipped and burning; his wife testified that the bicycle was so equipped, and that the light was burning when appellant left his home on the bicycle a few minutes before the accident occurred; the bicycle dealer from whom the bicycle had been purchased some two or three months before, testified that, when he sold, it was fully equipped with a regulation bicycle headlight; and a witness who worked with appellant testified that, on the night preceding the accident, he had observed the headlight on the bicycle and, as a matter of curiosity, had turned it on and off several times and found it then to be in perfect order. Other witnesses on both sides saw no light on the bicycle, and there was testimony on the part of the defense that an examination immediately after the accident showed no batteries or wires attached to the bicycle or about the place where the accident occurred. The affidavits in support of the motion for a new trial show that one Eder, who was well acquainted with appellant, met him just before the time of, and but a few blocks distant from, the place of the accident, and then observed that the headlight on his bicycle was burning; that he knew of the accident the next morning after it oc-

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curred, but did not disclose to appellant his knowledge regarding the headlight until after the trial below.

It has been repeatedly and consistently held in this state that it is not error to refuse to grant a new trial when the newly discovered evidence is merely cumulative and corroborative, and that the granting of a new trial upon the ground of newly discovered evidence, whether cumulative or not, is, from its nature, peculiarly within the discretion of the trial court, and the exercise of that discretion will not be disturbed except in cases of manifest abuse. *Roe v. Snyder*, 100 Wash. 311, 170 Pac. 1027; *Deitchler v. Ball*, 99 Wash. 483, 170 Pac. 123; *Ronald v. Pacific Traction Co.*, 65 Wash. 430, 118 Pac. 311. We are satisfied that there was no abuse of discretion here, and therefore cannot interfere.

Appellant complains of the refusal of an instruction to the effect that, if the driver of the automobile violated the city ordinance in making the turn from one street into the other at the point where the accident occurred, such violation of the ordinance was the proximate cause of the injury, notwithstanding there was no headlight burning on the bicycle at the time. The court did instruct to the effect that, if respondent's driver cut the corner in violation of the ordinance, he was guilty of negligence, and that it was for the jury to determine whether such negligence was the proximate cause of the injury. This was as far as the court could go without invading the province of the jury, and to have instructed as requested would have been to withdraw from the jury the right to find that the failure to carry a light on the bicycle, if there was such, was the proximate cause of the accident. This applies also to several other assignments of error made for the purpose of raising the same question. We have

examined the instructions given and refused and are satisfied that appellant's requested instructions, so far as proper, were, in substance, given by the court.

Finding no error, the judgment is affirmed.

HOLCOMB, C. J., BRIDGES, MOUNT, and FULLERTON, JJ., concur.

[No. 15765. Department Two. August 24, 1920.]

SAMUEL PORTER, *Appellant*, v. E. E. BURKLEY *et al.*,
Respondents.¹

TAXATION (206)—TAX DEED—ACTION TO SET ASIDE—LIMITATIONS. The bar of the statute of limitations, Rem. Code, § 162, relating to actions to set aside tax deeds or for the recovery of lands sold for delinquent taxes, is not removed by the fact that a tax deed issued on foreclosure by an individual holder of a certificate of delinquency, was in the form used in county foreclosure cases, the recitals as to the order of the county board authorizing the sale and as to ownership by the county being surplusage only.

Appeal from a judgment of the superior court for Ferry county, Neal, J., entered July 19, 1919, in favor of the defendants upon the pleadings, in an action to foreclose a mortgage. Affirmed.

Samuel Porter, for appellant.

G. W. Sommer, for respondents.

TOLMAN, J.—Appellant, as plaintiff in the court below, brought this action to foreclose a mortgage upon certain real estate in Ferry county, Washington. Respondents, by answer, admitted the execution and delivery of the note and mortgage, and that the latter was duly recorded, and pleaded affirmatively that respondent Margaret Howell is the owner of the land described in the mortgage, by virtue of a tax deed duly

¹Reported in 191 Pac. 799.

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issued to her by the treasurer of Ferry county on June 28, 1915, and that more than three years elapsed after the issuance of such deed and before the commencement of this action. By his reply, appellant admits the issuance of the tax deed more than three years prior to the bringing of the action, but pleads that the tax deed was null and void by reason of irregularity in the proceedings leading up to its issuance; that the county treasurer had no authority in law to issue it, and, also, that it is void on its face. A judgment on the pleadings was entered, denying the foreclosure of the mortgage and dismissing the action as to the respondent Howell, and this appeal followed.

Appellant raises the question as to the sufficiency of the summons in the tax foreclosure case, under which respondent claims title; the sufficiency of the service in that case, and that the tax deed recites:

“That whereas, at a public sale of real estate, held on the 26th day of June, 1915, pursuant to an order of the board of county commissioners of the county of Ferry, state of Washington, duly made and entered, and after having first given due notice of the time and place and terms of such sale, and, whereas, in pursuance of said order of said board of county commissioners, and of the laws of the state of Washington, and for and in consideration of the sum of one hundred fifty-four and 98/100 dollars, lawful money of the United States of America, to me in hand paid, the receipt whereof is hereby acknowledged, I have this day sold to M. Howell, the following described real estate, and which real estate is the property of Ferry county,—”

claiming, in effect, that the deed being in the form used in cases where the county forecloses, it is not entitled to the protection of the statute in a case, such as this, of a foreclosure by an individual holder of a certificate of delinquency. The statute, Rem.

Code, § 162, is a statute of limitations barring any action "to set aside, or cancel a deed of any county treasurer issued after and upon the sale of lands for general, state, county or municipal taxes, or for the recovery of lands sold for delinquent taxes, . . ." after three years from the date of the issuance of such deed.

We think the recitals in the deed as to the order of the board of county commissioners and the ownership by Ferry county surplusage only, which does not vitiate, and such irregularities, and the irregularities, if any, in the summons, and the manner of its service, are such as the statute is meant to set at rest. We have so often upheld the statute and decided all the questions here presented in similar cases that a further discussion at this time seems unnecessary. *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850; *Baylis v. Kerrick*, 64 Wash. 410, 116 Pac. 1082; *Fleming v. Stearns*, 66 Wash. 655, 120 Pac. 522.

The judgment of the trial court is affirmed.

HOLCOMB, C. J., BRIDGES, MOUNT, and FULLERTON, JJ., concur.

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Opinion Per MITCHELL, J.

[No. 15755. Department One. August 24, 1920.]

PACIFIC GROCERY COMPANY, *Appellant*, v.
JAMES GRIFFITHS & SONS *et al.*,
Respondents.¹

LANDLORD AND TENANT (54)—POSSESSION AND USE—DISTURBANCE BY LANDLORD—DAMAGES—EVIDENCE—SUFFICIENCY. The evidence is insufficient to show damages to the business of plaintiff, a lessee of a portion of a dock, caused by another lessee of a portion thereof by the maintenance of a guarded gate locked at night and on Sundays across the entrance to the dock, or by the laying of an oil pipe line along the edge of the dock so as to interfere with the loading of boats, or damage to merchandise from steam escaping from a pipe extending through its warehouse, where it appears that plaintiff acquiesced therein and was not inconvenienced and suffered no material damage.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered May 28, 1919, upon findings in favor of the defendants, in an action for damages, tried to the court. Affirmed.

Cooley, Horan & Mulvihill and *W. P. Bell*, for appellant.

Trefethen & Findley, for respondents.

MITCHELL, J.—The Great Northern Railway Company is the owner of a dock and warehouse about eight hundred feet long, running east and west, in the city of Everett. The Pacific Grocery Company, under a lease from the Great Northern Railway Company, at one time occupied the east three hundred and five feet of the warehouse and conducted therein a wholesale grocery business, receiving much of its merchandise by boats and steamers. The dock on its southerly side extends about sixteen feet beyond the exterior wall of the warehouse. The Seattle-Everett Dock & Ware-

¹Reported in 191 Pac. 785.

house Company leased from the railway company and occupied the westerly five hundred feet of the warehouse for an oil dock. The Pacific Grocery Company orally sublet to the Seattle-Everett Dock & Warehouse Company and put it into possession of the westerly two hundred feet of the easterly three hundred and five feet of the warehouse. The approach from the street, several hundred feet distant, was over a drive and walkway to the eastern end of the dock and warehouse. The Seattle-Everett Dock & Warehouse Company maintained a gate, under guard during business hours and locked at night and on Sundays, across the drive and walkway several months prior to the Pacific Grocery Company's finally quitting possession of the warehouse. To facilitate its business as an oil dealer, the Seattle-Everett Dock & Warehouse Company, with the consent of the railway company, placed an oil pipe line along the top and near the south edge of the dock. Expecting to later occupy the remaining one hundred and five feet of the warehouse in possession of the Pacific Grocery Company (which occupancy had taken place at the time of the trial of this case), the Seattle-Everett Dock & Warehouse Company extended a steam pipe through that portion of the warehouse (the east one hundred and five feet) occupied by the grocery company. Upon making a test of the steam pipe, upon its being put in place, steam and vapor escaped through an open plug of the pipe into the room containing the merchandise of the Pacific Grocery Company.

This action was brought to recover for damage to the grocery company's business on account of the maintenance of the guarded gate in front of the premises; damage to the grocery company's business by placing and maintaining the oil pipe near the edge of the dock, interfering with loading and unloading boats;

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and damage to the stock of merchandise caused by steam that escaped from the steam pipe. The case was tried without a jury, resulting in findings, conclusions and a judgment against the plaintiff. The plaintiff has appealed.

As to the first claim of damage, it satisfactorily appears that, prior to building the gate, the Seattle-Everett Dock & Warehouse Company was advised by the Secretary of War that it would be necessary to erect gates at the entrance to the dock. The matter was taken up with the railway company, which gave its consent. Then the matter was taken up with appellant, through its president, and a sketch of the proposed location of the gates was submitted to him in a letter from Seattle-Everett Dock & Warehouse Company, dated March 19, 1918. On March 21, 1918, appellant's president replied by letter in which he said:

"We are in receipt of your letter of March 19. I think the gate idea is a good one, provided they are not locked so as to lock our customers out when they want to come in and buy goods, but it is a good plan to lock them at night and Sundays, and I think we can arrange a plan that will be mutually agreeable."

The gates were erected according to the sketch submitted, without any protest, and thereafter kept locked at night and on Sundays. During business hours the gates were guarded at the expense of the respondents, and no objection was ever made thereto by the appellant as to either the maintenance or method of operating the gates until about November 2, 1918, a day or two after appellant had received written notice from the railway company to vacate the premises. Appellant failed to show or name any customer or person who was either annoyed or kept away from its place of business on account of the gates. The watchman testified that all persons who had any business with

appellant passed without the slightest hindrance and that, during all the time, only four persons were refused, neither of whom claimed to have any business with the appellant.

As to the second claim of damage, the trial court found that the laying and maintenance of the oil pipe line did not interfere with the appellant's necessary ingress or egress, nor was any damage suffered by it on account of the existence and presence of the pipe line as placed. The finding is supported by a preponderance of the evidence. The president of appellant, on cross-examination, testified: "The pipe in front of the warehouse was objectionable, but did not seriously interfere with our daily routine of work." When the oil pipe was being constructed, the president of appellant company and the superintendent of the respondent Seattle-Everett Dock & Warehouse Company discussed the question as to whether or not the pipe would interfere with loading and unloading boats. Upon being informed by the superintendent that the pipe could be elevated to any height desired, the president of the appellant company replied: "He guessed it would be all right," and the pipe was laid as heretofore indicated.

As to the third claim of damage, there is a dispute as to whether or not any objection was made by the appellant to the putting of a steam pipe through its premises, until after the work was done. The evidence satisfies us more favorably against the appellant. The pipe was installed in the daytime during the hours appellant's agents and employees were engaged at their business in the room through which the pipe was run, without any objection being made to the plumbers or any one else while the work was being done; and it is undisputed that the appellant removed the plug

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Statement of Case.

through which the steam escaped for just a few minutes. We are also satisfied by the evidence that the appellant did not notify respondents it had removed the plug prior to the making of the test that caused steam to escape. In this respect the trial court found the steam did not cause any damage, and we are convinced the finding is correct.

Another error assigned, relating to alleged increased cost of insurance, we understand has been abandoned by the appellant on its appeal.

Judgment affirmed.

HOLCOMB, C. J., PARKER, MAIN, and BRIDGES, JJ.,
CONCUR.

[No. 15807. Department Two. August 24, 1920.]

A. J. CORTEZ, *Appellant*, v. SPOKANE INTERNATIONAL
RAILWAY COMPANY, *Respondent*.¹

RELEASE (8)—VALIDITY—FRAUD—EVIDENCE—SUFFICIENCY. Under the rule that evidence of fraud must be clear and convincing, a release of damages is not shown to have been fraudulently obtained by statements of doctors that plaintiff's foot would be all right and as good as ever in thirty to sixty days, where the settlement was made at plaintiff's solicitation and upon his own terms, he afterwards worked again for defendant for eight months in the same capacity as at the time of his injury, and waited more than a year after the settlement before bringing an action for damages, and there was no evidence of bad faith on the part of the doctors, who were disinterested and gave mere expressions of opinion and not a guarantee.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered January 30, 1920, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

¹Reported in 191 Pac. 820.

Plummer & Lavin, for appellant.

Allen, Winston & Allen, for respondent.

MOUNT, J.—The plaintiff brought this action to recover for personal injuries. Upon issues joined, the case was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff for \$6,680. Thereupon the defendant filed a motion for a new trial and for judgment notwithstanding the verdict. On the hearing upon these motions, the trial court denied the motion for a new trial, but granted the motion for judgment notwithstanding the verdict. The plaintiff has appealed from the order of dismissal.

The facts may be briefly stated as follows: On the 9th day of October, 1917, the appellant was employed as a switchman in the yards of the respondent in the vicinity of Spokane. The respondent at that time was engaged in interstate commerce. On that day several carloads of logs were shipped over the line of the respondent railroad from Idaho to the city of Spokane in this state. These cars were placed upon a siding upon a grade. The brakes were securely fastened while the switching crew, of which the appellant was one, were switching other cars. The switch engine coupled onto these loads of logs. The appellant was directed to release the brake on the car next to the engine. In order to do this he was required to stand on the drawbar between the engine and the loaded car. While he was in the act of releasing the brake, a fellow employee, by means of a rock, released the brake, which let the loaded car come down against the appellant's foot, thereby severely crushing the foot. The bones of the little toe and the second toe of the right foot were broken, and some bones were broken from the great toe of that foot. Thereupon the appellant

was taken to the hospital and was treated by Dr. Doolittle, who was then in the employ of the railway company. The appellant remained in the care of Dr. Doolittle for one month, and then left the hospital. He called upon Dr. Doolittle about twice a week after that time. On the 15th day of February, 1918, the appellant proposed to the claim agent that a settlement be made, appellant stating that he desired to purchase a Ford car and go into the junk business. He offered to settle for \$450. Mr. Shaw, the claim agent of the company, submitted this proposition to the railroad company. It was accepted and a settlement was made. The appellant signed a release for all claims of damages and was paid \$450 in cash at that time. He had been paid by the company up to that time his average wages after he was injured. Thereafter, in May of 1918, he was employed by the respondent as a brakeman, and continued in that employment until December of that year. At that time, on account of slack business, the crew was laid off and the appellant demanded wages for the month of December, which being refused, he made the statement, "I will make you pay," and then, in 1919, brought this action for damages on account of the injuries received on October 9, 1917.

The single question presented upon this appeal is whether the court erred in granting the judgment notwithstanding the verdict, upon the ground that the evidence was insufficient to show fraud in the settlement. The principal defense made by the respondent was that the settlement had been made. In reply to this defense the appellant alleged that the settlement was void because it was fraudulently made.

Upon the trial of the case it appeared that Dr. Doolittle, who had charge of the appellant after he was brought to the hospital, had gone to Florida in the

early part of January, 1918. The appellant testified upon the trial of the case as follows:

"A. Yes, sir, I went to Doolittle, that is, just before he went to Florida, and he told me it was only a matter of thirty to sixty days at the outside. 'All you have to do is to get out and exercise that foot and you will gain in strength,' but he says, 'loafing around the way you are,' he says, 'throw that cane away and get out and go to work.' Q. When he said it would be thirty to sixty days, what did you say to him at that time as to whether or not he was positive of it or anything of that kind? A. I told him I hoped it would be so, and he said it surely would—not in those words, he said, 'Your foot will be all right.' Q. Now after he went to Florida did Dr. Brown still treat you? A. Yes, sir. I was up to see—I was up to Dr. Brown twice a week. Q. And what did he say about you being well in thirty to sixty days? A. He said just the same as Dr. Doolittle did. Q. Did you tell him at that time that you were negotiating a settlement with the company and wanted to know positively what the result would be? A. Yes, sir. Q. And what did he say to that? A. Well he says, 'You will be all right' just as Dr. Doolittle said my foot would be all right in thirty to sixty days. All it would need was exercise and to walk on it. I told him all the time that there was broken bones in there, that it was hurting me. He said there would be a cartilage formed around those bones, that 'it would be all right, you won't feel that at all.' Q. Did you rely upon that statement the doctors made to you? A. I certainly did. Q. Would you have signed that release but for that statement? A. No, sir, I would not. Q. Did Dr. Doolittle at the time he took charge of this foot take any X-ray plates of it so that he could see? A. Yes, he took them the next morning after I was injured. Q. Did he tell you that you would fully recover and that your foot would be as good as it ever was? A. He certainly did. Q. Never mentioned to you that it was his opinion, did not say, 'it is my opinion it will be,'—he guaranteed it to you? A. He certainly did. Q. He said it sure would happen?

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A. He says, 'in thirty to sixty days you will never know your foot was hurt, it will be as good as it ever was, and you can do as good a job switching as any man working for a railroad.' Q. And told you, Mr. Cortez—how long after the injury was that? A. That was along the fore part of January."

Mrs. Cortez testified that, in January, Dr. Doolittle was called to her house on account of sickness, and she was asked the following question:

"Did Dr. Doolittle say anything at that time with reference—that is, to Mr. Cortez in your presence or to you in the presence of Mr. Cortez where he could hear it, as to when his foot would be all right? A. Yes, sir. I wanted Dr. Doolittle to look at his foot to see if he could relieve it, and he told me that I need not worry about the foot, that he had done all that any doctor could do for the foot, and that the foot was all right and that within a month or two months at the most he would be able to switch again, that is what he said."

Both Dr. Doolittle and Dr. Brown denied that any such conversations had taken place or that they made any representations as to when the foot would be well. We think it is plain from the evidence in the case that, even if Dr. Doolittle and Dr. Brown made the statements attributed to them by the appellant and his wife, these statements were mere expressions of opinion. This court has laid down the rule in a number of cases that, before a written contract can be set aside for fraud, the evidence upon that question must be clear and convincing. In the case of *Nath v. Oregon R. & Nav. Co.*, 72 Wash. 664, 131 Pac. 251, which was a case similar to the one now before us, we said:

"The law favors an amicable settlement of claims of this character, and when such a settlement appears to have been fairly made, and has not been secured by fraud, false representations or overreaching, it must be sustained."

Then, after citing cases:

"To avoid a settlement on the ground of fraud, requires clear and convincing proof. The most convincing evidence should be required in a case such as this, where the validity of the settlement was not questioned for more than two years. If respondent was defrauded and misled, as he now contends, he should have discovered that fact long prior to the commencement of this action. Yet he retained the money, worked for appellant at hard labor, and for more than two years made no attempt to rescind."

The same is true of this case. The appellant here made the settlement in February of 1918, and for two or three months after that time he was engaged in the junk business. Then, on the first of May, he went to work for the respondent again in the capacity of a brakeman and continued in their employ until December of that year. He brought this action in 1919, more than a year after the settlement. There is no evidence in the record that, between the time of the settlement and the time of the suit, any complaint was made that he had been defrauded. In the case of *Spratt v. Northern Pac. R. Co.*, 90 Wash. 592, 156 Pac. 563, we said:

"Releases in a case of this kind are like any other writing, and they are not to be lightly overcome. . . . The testimony should be clear and convincing, especially so where, as in this case, the issue strips down to one charge that the one seeking to overcome it did not understand the paper which he admits was read to him."

In *Reynolds v. Day*, 93 Wash. 395, 161 Pac. 62, we said:

"Releases of this kind are like any other writing and are not to be lightly overcome. If they are not induced by fraud, false representations, or overreaching, they must be sustained. The testimony to sustain the charge of fraud must be clear and convincing," citing a number of cases.

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It is argued by counsel for appellant that the statements made by Doctors Doolittle and Brown were fraudulent because they knew, or should have known, that appellant would not be well in the time stated, and that the question was for the jury whether the doctors' statements were expressions of opinion or the statement of a fact.

No bad faith on the part of either of these doctors is shown. They were not urging a settlement. The settlement was made at the voluntary solicitation of the appellant himself after he was walking around. It was made upon his own terms to the claim agent of the respondent before that agent had suggested a settlement, except to say to appellant that he was anxious to get him off his list.

At the time of the trial, neither of the doctors were in the employ of the respondent and they had no interest in the controversy except to state the truth. We do not mean by this that the trial court should weigh conflicting evidence, but it is the duty of the trial court to determine whether evidence upon the question of fraud is clear and convincing within the rule of the cases above cited, and if not so, to take that question from the jury.

We are satisfied in this case, after carefully reading the evidence, that, even though the doctors made the statements attributed to them, their statements were mere expressions of opinion and not a "guarantee" or "assurance" that the appellant would be well in thirty or sixty days, or any other time. There is no other evidence of fraud and no claim of fraud, except in the statements of the doctors to the effect that appellant would be well in thirty or sixty days. Under the rule that the evidence of fraud must be clear and convincing, we are satisfied that the evidence in this

case did not measure up to that rule, and that the court therefore properly concluded that the evidence upon this question was not sufficient to go to the jury, and that being so, it was his duty, under § 340 of Rem. Code, to direct a judgment in favor of the respondent.

The judgment appealed from is therefore affirmed.

HOLCOMB, C. J., TOLMAN, and BRIDGES, JJ., concur.

[No. 15811. Department Two. August 24, 1920.]

L. H. WOOLFOLK, *Appellant*, v. MULLINS SAW MILL
COMPANY *et al.*, *Respondents*.¹

APPEAL (418)—REVIEW—FINDINGS. The findings of the trial court upon conflicting evidence will not be disturbed on appeal, where the court had the witnesses before it and was in better position to weigh their testimony, and it appears that the weight of the evidence is with the respondent.

Appeal from a judgment of the superior court for King county, Ronald, J., entered December 31, 1919, upon findings in favor of the defendants, dismissing an action to compel the issuance to plaintiff of certain shares of corporate stock, tried to the court. Affirmed.

Vince H. Faben, for appellant.

Raymond G. Wright and *Walter S. Fulton*, for respondents.

BRIDGES, J.—The plaintiff brought this action to compel the issuance to him of two hundred shares of the capital stock of the defendant Mullins Saw Mill Company, a corporation; one hundred and ninety-eight of which shares at the time of suit were in the name of W. J. Mullins, the president of the corporation, and one share held each by D. Morgan and M. Mullins.

¹Reported in 191 Pac. 854.

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The trial court found for the defendants and entered judgment dismissing the action, from which the plaintiff has appealed.

The following facts are substantially undenied: In 1916, the Seattle Saw Mill Company became insolvent and was thrown into the hands of a receiver. The respondent W. J. Mullins was financially interested in, and was a stockholder of, that company. Prior to its insolvency it had become, and thereafter remained, indebted to the Scandinavian-American Bank of Seattle, as well as to various other persons. The assets of the Seattle Saw Mill Company were finally sold by the receiver to one Prescott for \$8,000. It appears that Prescott probably purchased at the receiver's sale for the benefit of W. J. Mullins. At any rate, Mullins purchased the property from Prescott at the price the latter had paid. The Mullins Saw Mill Company was then organized with a capital stock of \$30,000, divided into three hundred shares, each share of the par value of \$100. Thereafter Mullins transferred the property so obtained by him to the Mullins Saw Mill Company in full payment of all of the capital stock of that company. There was at once issued to him two hundred and ninety-nine shares, and to the appellant one share. Mullins obtained from the Scandinavian-American Bank the \$8,000 which he paid for the Seattle Saw Mill Company's property. During all of this time, and for some time before and after, the appellant was the assistant cashier of the above mentioned bank and had charge of the indebtedness due it from the Seattle Saw Mill Company, and also took a more or less active part in all of the transactions heretofore mentioned.

On June 6, 1916, the stock of the Mullins Saw Mill Company, as originally issued, was redistributed and issued as follows: One hundred shares to W. J. Mul-

lins; one hundred shares to the appellant; ninety-nine shares to the appellant as trustee, and one share to E. E. Ballinger. The capital stock of the company remained in this condition until August, 1918, when the appellant transferred the one hundred and ninety-nine shares held by him in person and as trustee to the respondent Mullins, to whom such shares were thereafter reissued.

The appellant contended that he personally advanced or borrowed from the Scandinavian-American Bank the \$8,000 with which Mullins purchased the assets of the Seattle Saw Mill Company; that it was agreed that he should own two-thirds of the capital stock of the Mullins Saw Mill Company, which he helped to organize and of which he was a trustee and officer; that he finally surrendered all of his stock to Mullins as an accommodation to the latter, with the understanding that it was to be returned to him, and that at all times he was personally the owner of said two hundred shares.

The respondent denied that the appellant ever personally owned any of the capital stock of the last named company, or ever had any financial interest therein, or ever advanced any money to it or to Mullins for its use and benefit, and that whatever he did in connection with the affairs of the Mullins Saw Mill Company was as assistant cashier and for the benefit of the Scandinavian-American Bank. Upon these disputed facts, the testimony of the two principal parties was in all things, material and immaterial, absolutely contradictory. The findings of fact of the trial court were to the effect that the appellant had held certain of the stock of the Mullins Company for the use and benefit of the Scandinavian-American Bank, of which he was the assistant cashier, and that he acted for that

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bank solely in all transactions with reference to the Mullins Company, and at no time was the owner of any of its capital stock.

The only questions involved in this case are questions of fact. The witnesses were personally before the trial court who was in better position to weigh the contradictory testimony than we are. We have very carefully read the abstract of the testimony and also important parts of the statement of facts, and conclude that there was ample testimony to support the findings of the trial court. In fact, it seems to us that the weight of the testimony is with respondent. It would serve no good purpose to here recite it in detail, and we are satisfied to affirm the judgment. It is so ordered.

HOLCOMB, C. J., TOLMAN, MOUNT, and FULLEBTON, JJ., concur.

[No. 15835. Department Two. September 1, 1920.]

THE STATE OF WASHINGTON *on the Relation of W. E. Stanger, Respondent, v. ELMER H. BARTLETT et al., Appellants.*¹

TAXATION (6) — SPECIAL ASSESSMENTS — BENEFITS TO PROPERTY. The levying of special assessments on lands for benefits conferred, as an exercise of the taxing power, does not violate the constitutional requirements as to uniformity of levy or equality of taxation; but they must correspond in theory at least with the benefits conferred.

CONSTITUTIONAL LAW (43) — POLICE POWER — DESTRUCTION OF ANIMAL PESTS. Laws of 1919, p. 425, § 1, providing for the creation of pest districts by the board of county commissioners on petition of taxpayers of the county, for the purpose of exterminating animals destroying crops, is constitutional as being within the police power of the state.

¹Reported in 192 Pac. 945.

AGRICULTURE — DESTRUCTION OF ANIMAL PESTS — ASSESSMENTS — CLASSIFICATION OF LAND — STATUTES — CONSTRUCTION. Laws of 1919, p. 425, § 7, providing for the levying of an assessment against lands benefited by the creation of a pest district and that the board of county commissioners "may classify the lands into tillable, grazing, and waste lands and fix the assessment for each class in such amount as shall seem just," etc., and that the finding by the board of special benefits shall be conclusive, will be construed as requiring classification of the lands as a prerequisite to the adoption of that method of raising the required revenue, instead of the levying of an annual tax as provided in the first paragraph of the section; the word "may," as used in the section, having a mandatory meaning and equivalent to the word "shall."

SAME. The fact that classification of the land would, in certain instances, be a physical impossibility is a question of no concern to the court, since it cannot be presumed that the legislature in providing therefor did a useless thing.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered February 13, 1920, in favor of the plaintiff, upon sustaining a demurrer to the answer, in an action to enjoin the levy and collection of a tax. Affirmed.

Joseph B. Lindsley and Fred J. Cunningham, for appellants.

HOLCOMB, C. J.—Section 1, Ch. 152, Laws of 1919, p. 425 ("An Act relating to the destruction or extermination of rodents and other animal pests detrimental to the agricultural interests in any community, providing a fund therefor, the creation of pest districts, and the levying of taxes or assessments thereon"), provides:

"For the purpose of destroying or exterminating squirrels, prairie dogs, gophers, moles or other rodents, . . . or any predatory animals that destroy or interfere with the crops, . . . or other agricultural plants or products, . . . or to prevent the introduction, propagation, growth or increase in num-

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ber of any of the above described animals, or rodents, the board of county commissioners of any county may create a pest district or pest districts within such county . . .”

Other sections provide means for accomplishing the purpose of the act as generally expressed in the title.

Certain taxpayers of Spokane county, about four hundred in number, on August 23, 1919, petitioned the county commissioners for the formation into a pest district, in accordance with the provisions of the act, of all land in the county outside the corporate limits of incorporated cities and towns. Notice of a hearing on this petition was given, as required by the act, to the freeholders of the county; and at the hearing thereafter held, the county commissioners passed a resolution under which the pest district was created and designated as pest district No. 1 for Spokane county, Washington. It appearing to the county commissioners that the destruction of such animal pests as the act contemplated would be of special benefit to the lands within the district, and that such special benefit would be reasonably worth ten cents an acre to such lands, regardless of whether tillable, grazing or waste lands, the commissioners, in order to raise funds with which to carry out the purposes of the act, by resolution, assessed the lands lying within the district and provided for the collection of the assessment, as follows:

“That against each and every acre and fraction thereof of land included in such pest district there shall be specially assessed an assessment of ten cents.

“That the county assessor and county treasurer of Spokane county be and they hereby are authorized and instructed to levy and collect such assessment against such lands in the manner provided by law.”

Thereafter, on October 6, 1919, the tax was levied upon the lands included in the district as formed. On

November 20, 1919, W. E. Stanger, the owner of 1,100 acres of timber land, valued at about five dollars an acre, lying within the district, sought to enjoin the assessor and the treasurer of Spokane county from collecting the assessment, contending that the assessment was illegal because the commissioners failed to classify the lands lying within the district, but assessed all lands, irrespective of valuation and benefits to be derived from the destruction of pests, at the same rate; and also contending that the act itself was unconstitutional on account of its having no provision for the taxing of property within a district *in proportion to its value and at a uniform and equal rate of assessment*. The county officials demurred generally to the complaint. The demurrer was overruled and defendants answered, setting up certain affirmative defenses which alleged, in substance:

That the complete extermination of the pests and a systematic plan of destruction over the entire county were necessary; that the classifying of all lands as tillable, grazing and waste, was impracticable; that wide publicity was given the petition and hearing, and neither plaintiff nor any other person appeared to object to the formation of the district or ask to have his lands excluded therefrom; that the county had expended money in the preparation of assessment rolls; and that plaintiff was estopped to question the legality of the establishment of the pest district and the special assessment levied therefor.

To these affirmative defenses plaintiff demurred on the ground that they did not state facts sufficient to constitute a defense. The court sustained the demurrer. Thereupon, defendants electing to stand upon their pleadings and refusing to plead further, judgment was entered restraining the assessor from extending or certifying the tax rolls showing the levy, and restrain-

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ing the treasurer from collecting the tax. From this judgment, those officials have appealed.

Respondent has filed no brief and made no appearance in this court.

Appellants make a number of assignments of error, but state that they all relate to, and may be discussed under, two questions; one as to the power of the commissioners to levy an assessment at a uniform rate against all lands in the district; and the other as to the constitutionality of an act of the legislature providing for special assessments disregarding the valuation of the property assessed.

We have uniformly sustained the power to levy special assessments upon land, as an exercise of the taxing power, whenever there were any special benefits involved; but always upon the theory that the benefits conferred equaled the special assessments or special taxes levied. Under such theory there is no violation of our constitutional requirements as to uniformity of levy or equality of taxation. But they must correspond, in theory at least, with the special benefits conferred or they are invalid.

We are not persuaded that there is any necessity for any extended discussion as to the constitutionality of this act. The police power of the state extends to remedy such mischiefs here sought to be remedied and is ample to delegate such powers to the counties, as political subdivisions of the state, or other local authorities. *Wedemeyer v. Crouch*, 68 Wash. 14, 122 Pac. 366, 43 L. R. A. (N. S.) 1090; *Northern Pac. R. Co. v. Adams County*, 78 Wash. 53, 138 Pac. 307, 51 L. R. A. (N. S.) 274.

The interpretation of § 7 of the act presents no difficulties. In fact, such a task can hardly be said to confront us; for the language of the section is so clear and unequivocal that the intention of its framers is

readily gathered from a reading of it. The first paragraph is as follows:

“For the purposes herein specified the board of county commissioners shall annually levy on all the taxable property within any district a tax for such district not to exceed five mills on the dollar to be levied and collected as in this act prescribed.”

It will be seen at once that, by this single paragraph of the section, it is provided that the county commissioners may, if they so elect, raise this revenue by a general tax on all the taxable property within the district. Complete provision is made by this paragraph for one method of securing the funds necessary to undertake the destruction of pests in the district.

The other method of raising this money—and the one here adopted by the commissioners—is provided by the remaining paragraph of § 7 in the following language:

“If, however, they shall deem that the prevention, destruction or extermination of any such animals, or other pests shall be of special benefit to the lands within any such district they may in lieu of a tax, levy an assessment against the lands therein at not to exceed ten cents per acre. For this purpose they may classify the lands into tillable, grazing, and waste lands and fix the assessment for each class in such amount as shall seem just, but which shall be uniform per acre in its respective class. The finding by the board of such special benefits, when so declared by resolution and spread upon the minutes of the board shall be conclusive that the same is of special benefit to the lands within the district.”

If the county commissioners deem that the lands within the district shall be specially benefited by the prevention or destruction of the animals considered as pests, they are alternatively authorized by the first sentence of this paragraph to levy special assessments

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against such lands not exceeding ten cents per acre. The next sentence reads:

“For this purpose they may classify the lands into tillable, grazing, and waste lands and fix the assessments for each class in such amount as shall seem just, but which shall be uniform per acre in its respective class.”

Resort need not be had to any rules of guidance to determine that the word “may,” in the connection here used, has a mandatory meaning and is equivalent to “shall.” In other words, classification of the lands by the commissioners, as by the statute directed, is a prerequisite to the adoption of the method of raising the required revenue by means of special assessment.

The third and concluding sentence of this second paragraph of the section provides that the finding by the commissioners of such special benefits shall be conclusive.

There is a suggestion by counsel for appellants that, in providing that lands might be classified for the purposes of assessment, the legislature must have had in mind something practical, but that, if the county commissioners found the lands included in the district should be assessed for special benefits, such finding would be conclusive. As already pointed out, the legislature undoubtedly intended that, if the county commissioners chose to adopt the alternative method of taxation by special assessment, they must comply with the provision of the statute for classification of the land. The finding of special benefits would then be conclusive.

It is earnestly insisted by appellants that, in the instant case, classification would be a physical impossibility. That is obviously an aspect of the question with which we have no concern; and, as already suggested, it cannot be presumed that the legislature, when

it made provision for the classification of lands included in the district created, did a useless thing.

From the foregoing observations, it follows that the judgment of the trial court should be, and it is, affirmed.

BRIDGES, TOLMAN, and MOUNT, JJ., concur.

FULLERTON, J., dissents.

[No. 15788. Department Two. September 1, 1920.]

THE CITY OF ROSLYN, *Respondent*, v. EMIL PAVLINOVICH,
Appellant.¹

MUNICIPAL CORPORATIONS (336)—VIOLATION OF HEALTH ORDINANCE—COMPLAINT—SUFFICIENCY. A complaint charging that defendant violated an ordinance providing that it "shall be unlawful for any person to refuse, fail or neglect to comply with any legal order of the health officer," by alleging that he "did wilfully and unlawfully refuse, fail and neglect to comply with the legal order of the health officer . . . in that he permitted people to congregate at his place of business and play cards," is sufficient to charge a misdemeanor.

EVIDENCE (79)—BEST AND SECONDARY EVIDENCE—PROOF OF EFFORT TO SECURE PRIMARY EVIDENCE. Oral testimony of the contents of a written instrument is not admissible upon mere proof that the writing had been sent to a party in another city and that an attempt had been made to secure it for the trial, but that it had not been returned; since a reasonable effort to secure the writing was not shown.

SAME (79)—CONTENTS OF LETTER—ADMISSIBILITY. It was error to allow witness to testify to the contents of a letter which he said he had received but did not have with him, but was in his office, since the letter itself was the best evidence of its contents, and no sufficient excuse was shown for failure to produce it in court.

Appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered July 18, 1919, upon a trial and conviction of a misdemeanor. Reversed.

¹Reported in 192 Pac. 885.

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Pruyn & Hoeffler, for appellant.

Harry L. Brown, for respondent.

BRIDGES, J.—The defendant was convicted on a criminal complaint filed with the police justice of the city of Roslyn, Washington. He appealed to the superior court, where the case was tried before a jury on the original complaint. There was a verdict against him. From a judgment entered thereon he has appealed.

The complaint upon which the appellant was tried and convicted reads as follows:

“That on or about the 23d of October, 1918, at the city of Roslyn, in said Kittitas county, Washington, one Emil Pavlinovich did commit the offense of violating section 1 of ordinance 161, of said city, as follows, to-wit, the said Emil Pavlinovich then and there being did wilfully and unlawfully refuse, fail and neglect to comply with the legal order of the health officer of the said city, in that the said Emil Pavlinovich permitted people to congregate at his place of business at No. 12 Pennsylvania Avenue, in said city and play cards therein. . . .”

The appellant contended in the court below, and contends here, that the complaint is insufficient to charge a misdemeanor. Section 1 of the ordinance mentioned in the complaint provides that it “shall be unlawful for any person to refuse, fail or neglect to comply with any legal order of the health officer” of the said city. It seems plain to us that the complaint very directly charges that the appellant violated this ordinance by failing and refusing to obey certain health orders and regulations made by the city health officer. This is sufficient to charge a misdemeanor. The complaint was sufficient.

The order of the health officer was in writing. It was given to the constable, who caused the inhabitants to become acquainted with its contents. It appears

from the testimony that the health officer's written order or regulation was not in court at the time of the trial, and the state undertook to orally prove the contents thereof. The health officer testified that his written order had been sent to Dr. Tuttle, state health officer at Seattle, and that he had attempted to secure it for the purpose of this trial, but that it had not been returned to him. He further testified that there was no copy of the original order unless the same should be in the hands of the mayor of the city. No effort was made to show whether the mayor had a copy. Under these circumstances, the court allowed the witness, over the objection of the appellant, to orally testify concerning the contents of the written order.

Oral testimony of the contents of a written instrument is not admissible until a satisfactory explanation is given for the failure to present the writing itself. The rule is that a reasonable effort must have been made to obtain the written instrument. As to what will be considered a reasonable effort is dependent to a considerable extent upon the importance, in the case, of the written instrument. Here the appellant is charged with violating the city ordinance by failing to obey the written order of the city health officer. Before we can determine whether the appellant violated such order we must know what that order is; consequently the guilt or innocence of the appellant depends almost entirely upon the order of the health officer. 10 R. C. L. 911, 918; 17 Cyc. 543 *et seq.* The mere statement of the witness that he had tried to have the order returned to him that it might be used at the trial falls far short of satisfactory proof. It was not shown when, or of whom, he tried to get the writing, why it was not returned, or the extent of his effort to get it. Nothing was shown except he had tried to get it, and that it had not been sent to him. Reasonable effort

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means much more than this. The court is entitled to know what was done, what effort was made.

It is true the city attorney, who prosecuted this case, later testified for the state that he had written to Dr. Tuttle for the original document, and that he had received a letter from him stating that the document was not on file with him, Dr. Tuttle. The appellant objected to the witness testifying to the contents of the letter from Dr. Tuttle. The witness then testified that he did not have that letter with him, but that it was in his office at Roslyn. The court overruled the objection, and in doing so we think was in error. The witness could not give the contents of Dr. Tuttle's letter to him under these circumstances. The letter itself was the best evidence of its contents. No sufficient excuse was given for not having it in court. Not only did the testimony of this witness fail to show a sufficient excuse for not having the original order in court, but, in attempting to show such excuse, the court committed error in allowing that witness to testify concerning the contents of the letter. We are convinced that the testimony fails to show any reasonable effort to have the health officer's order in court, and that the court erred in allowing oral testimony as to its contents.

We conclude that the court should have granted the appellant's motion for a new trial for the reasons above mentioned. The disposition we have made of the case makes it unnecessary to consider other alleged errors, none of which is likely to occur at a new trial.

The judgment is reversed, and the cause remanded with directions to the court to grant appellant a new trial.

HOLCOMB, C. J., TOLMAN, MOUNT, and FULLERTON, JJ., concur.

[No. 15868. Department Two. September 1, 1920.]

ELI YARROUGH, *Respondent*, v. WALKER D. HINES,
Appellant.¹

NEW TRIAL (56)—EXCESSIVE VERDICT—REDUCTION OF EXCESS. The trial court, on motion for new trial, has power to refuse to grant the same on condition that plaintiff will voluntarily remit a portion of the verdict in his favor.

DAMAGES (84)—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$5,500, reduced by the trial court to \$3,250, is not excessive, where plaintiff suffered a fracture of the lower end of the fibula, he was in a hospital for several weeks, the heel cord had shortened up so that in walking he could not put his heel on the ground, and his condition is shown to be serious and more or less permanent.

DAMAGES (14-1) — PERSONAL INJURIES — AGGRAVATION OF INJURY THROUGH MALPRACTICE OF PHYSICIAN. Where an injured person, in good faith and in the exercise of reasonable care, employs a physician to treat his injury and it is aggravated through mistake or negligence, such negligence or mistake of the physician does not become an intervening cause, and he may recover damages for the injury he sustained, including aggravation thereto resulting from the mistake or improper treatment.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered December 26, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries Affirmed.

George W. Korte and Lee & Kimball, for appellant.

Robertson, Miller & Robertson, for respondent.

BRIDGES, J.—Action by respondent to recover damages for personal injuries received while in the employ of the appellant. The jury awarded respondent \$5,500. The trial court, at the time of the argument of appellant's motion for new trial, intimated he would grant such motion unless the respondent would consent to a reduction of the verdict to \$3,250. He thereafter filed

¹Reported in 192 Pac. 886.

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in the cause his remittance in the sum of \$2,250 and consented to a judgment in his favor of \$3,250. Judgment was accordingly entered for this amount. The defendant has appealed.

The appellant seems to concede that the testimony was of such character as to require the case to be submitted to the jury. It does not here complain of any errors of the court during the progress of the trial, but does contend that, inasmuch as the court found and determined that the verdict was excessive, it should have granted a new trial, and had no authority to require the respondent to remit a part of the verdict, or to make judgment against it for the reduced amount. It admits that the trial court followed the practice in this state and that such practice has been approved by this court. It argues that each of the parties to the action is entitled to have the matter of damages determined by a jury and not by the court, and asks this court to recede from its former holdings.

Whatever may be the rule in other states, the practice in this jurisdiction has been settled for so long a period that we do not consider it necessary to now review the cases out of this court. We have uniformly held that the trial court has power to refuse to grant a new trial on condition that the plaintiff will voluntarily remit a portion of the verdict in his favor. An extensive examination of the authorities convinces us that on this question our former rulings are supported by the courts of most of the states, as well as the supreme court of the United States. This identical question has been before us a great many times during the past twenty-five years and our ruling has always been the same. The following is a partial list of the cases from this court deciding the question contrary to the appellant's contention: *Winter v. Shoudy*, 9 Wash. 52, 36 Pac. 1049; *McDonough v. Great Northern R. Co.*, 15

Wash. 244, 46 Pac. 344; *Hughes v. Dexter Horton Co.*, 26 Wash. 110, 66 Pac. 109; *Bailey v. Cascade Timber Co.*, 35 Wash. 295, 77 Pac. 377; *Wait v. Robertson Mortgage Co.*, 37 Wash. 282, 79 Pac. 926; *McQueen v. Seattle Elec. Co.*, 48 Wash. 362, 93 Pac. 518; *Matsuda v. Hammond*, 77 Wash. 120, 137 Pac. 328, 51 L. R. A. (N. S.) 920. A further examination of the question convinces us that those cases were properly decided. The reasons and grounds for the practice are well stated in the case of *Arkansas Valley Land etc. Co. v. Mann*, 130 U. S. 69; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; a valuable note on the subject will be found in 39 L. R. A. (N. S.) 1064 *et seq.*

But the appellant contends that the amount of respondent's recovery is still excessive, and on that account it should be granted a new trial or the amount of the judgment reduced. The direct result of the injury was a fracture of the lower end of the fibula. The respondent's foot was put in a plaster cast and he was confined to the hospital for several weeks, and at the time of the trial, which was some six months after the injury, there was a shortening of the heel cord, which caused a drawing up of the heel and a consequent dropping of the toes, so as to cause a condition commonly known as claw-foot, or toe-drop. In walking the respondent could not put his heel on the ground, but was required to put his weight on the ball of the injured foot. The testimony tends to show that a surgical operation on the heel cords would probably eliminate a part of the difficulty, but there is no certainty about this. In any event, it is plain that he must go through the remainder of his life in a more or less crippled condition. The testimony quite conclusively indicates that the present condition of the respondent's foot is not the necessary result of the injury but may have been caused by an improper placement of the

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foot in the plaster cast, or by some other improper treatment of the original injury. However, it does not make much difference whether respondent's present condition is the result of the original injury or that injury in connection with its treatment, for the law unquestionably is that if an injured party, in good faith and in the exercise of reasonable care, employs a physician to treat his injury and it is aggravated through the mistake or negligence of his physician, such negligent or mistaken treatment of the physician does not become an intervening cause, and that the injured party may recover damages for the injury he has sustained, including the aggravation thereto resulting from the mistaken or improper treatment. *Martin v. Cunningham*, 93 Wash. 517, 161 Pac. 355, L. R. A. 1918A 225, and cases there cited. It must be admitted that respondent's present condition is serious and more or less permanent. Under these circumstances, we cannot say that the amount awarded him by the judgment of the court is excessive.

The judgment is affirmed.

HOLCOMB, C. J., TOLMAN, MOUNT, and FULLERTON, JJ., concur.

[No. 15532. *En Banc*. September 1, 1920.]

SOUND TIMBER COMPANY, *Appellant*, v. DANAHER
LUMBER COMPANY, *Respondent*.¹

WITNESSES (122) — IMPEACHMENT — INCONSISTENT STATEMENTS. Where plaintiff's witness denied, on cross-examination, having a conversation with a third person in which he made a statement conflicting with his present testimony, it was proper to allow such third person to testify that the conversation occurred at a certain time and place, since it tended to contradict his present version of the matter.

SAME (120) — IMPEACHMENT — TIME AND PLACE OF STATEMENTS. Failure to fix the time and place of a conversation which a witness denied having had on cross-examination, does not prevent evidence of the occurrence of the conversation to impeach the witness, where the witness denied ever talking with the person in question.

EVIDENCE (37, 49) — RELEVANCY — FACTS RELEVANT TO PARTICULAR ISSUES — THREATS BY THIRD PERSONS. In an action by one timber company against another for damages from fire, evidence of threats made by members of the I. W. W. is admissible as to the origin of the fire, there being proof that the fire occurred on the day defendant resumed operations after a strike brought on by I. W. W. members, many of whom were in the immediate neighborhood and capable of carrying out their threats.

RAILROADS (110) — FIRES — CAUSE OF FIRE — QUESTION FOR JURY. In an action by one timber company against another for damages from fire started through negligent operation of defendant's logging engine, the question of the origin of the fire is for the jury, where evidence showed threats made by members of the I. W. W. if the logging camps were started, that the fire started on the day defendant resumed operations, the presence of the men making the threats, the fact that a stranger was seen apparently in the act of starting a fire, and that strange men were seen running from the place where the fire started.

TRIAL (29) — RECEPTION OF EVIDENCE — REBUTTAL. In an action by one timber company against another for damages from fire, upon an issue made that the fire was set out by members of the I. W. W., some of whom made threats, evidence offered by plaintiff on rebuttal that at least one I. W. W. stated that they desired to avoid fires

¹Reported in 192 Pac. 941.

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is properly excluded, since it did not tend to dispute defendant's testimony.

APPEAL (445)—REVIEW—HARMLESS ERROR—CONDUCT OF COUNSEL. Error cannot be predicated upon an improper remark of counsel during examination of a witness, where the court cautioned the jury against remarks of the attorneys which were not borne out by the testimony.

APPEAL (457) — REVIEW — HARMLESS ERROR — EXCLUSION OF EVIDENCE. The rejection of evidence that would have been only cumulative and of little probative value is harmless error.

TRIAL (24)—RECEPTION OF EVIDENCE—CUMULATIVE EVIDENCE. The rejection of cumulative evidence is discretionary with the trial court.

WITNESSES (78, 81) — CROSS-EXAMINATION — LIMITATION — IMMATERIAL MATTERS. It is proper to sustain objections to questions on cross-examination which touched matters foreign to those brought out on direct examination and were immaterial.

TRIAL (88) — INSTRUCTIONS — CONFUSING OR MISLEADING INSTRUCTIONS. Written instructions telling the jury to disregard statements made by the court during the trial as to the law applicable to the issues, and that the written instructions contained all the law the jury were at liberty to consider, are not objectionable as tending to confuse the jury and cause them to feel at liberty to consider testimony that had been stricken out, another portion of the instructions having told the jury to disregard all evidence stricken out by the court.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered February 17, 1919, upon the verdict of a jury rendered in favor of the defendant, in an action for damages to property destroyed by fire. Affirmed.

Alexander & Bundy, for appellant.

R. S. Holt, for respondent.

BRIDGES, J.—The Sound Timber Company brought this action against the Danaher Lumber Company to recover damages for destruction of property by a forest fire alleged to have been started by sparks permitted to escape, by the negligence of defendant, from its logging locomotive on August 24, 1917. It is alleged

the fire thus negligently started originated on lands being logged by the defendant, and from there was communicated to the plaintiff's adjoining lands. Upon a verdict in favor of defendant and the denial of a motion for a new trial, a judgment of dismissal of the cause of action was entered, from which plaintiff has taken an appeal.

The parties generally were engaged in logging operations. Respondent's camps and logging railroad where the fire originated were on the west side of the Sauk river; while appellant's operations were on the east side of the river. The camps of both parties had been closed down for more than a month on account of labor troubles. Appellant's camp continued closed. Respondent started operations again on August 24, the day of the fire. It appears that one of respondent's railroad engines was equipped for, and was usually fired by, the use of oil, and that it was not provided with a spark arrester, such as is generally used in engines burning coal or wood. Appellant introduced testimony tending to show that, before noon of the day of the fire, this engine was being operated while there were in its fire box live wood coals, and that the sparks were blown off, causing a fire, which, during the afternoon, spread to appellant's works. Respondent, on the contrary, offered testimony tending to show that it did not operate its engines as charged, and that the fire which did the damage complained of was not started by its engine. At any rate, a few minutes before noon of August 24, fire was discovered near the logging railroad over which respondent's locomotive had passed. This fire got beyond control and, during the afternoon and night, burned over a large area of respondent's lands in different directions from the starting point, and finally burned generally in a southwesterly direction.

It is appellant's contention that, not long after the fire started, and while it was burning eastwardly, sparks and live coals of fire were blown across the river and set fire to its property, causing the damage complained of. One Bauguess, a witness for the appellant, after testifying that, from the place of origin, the fire spread toward appellant's property, and that a strong air current carried smoke, light particles of burning leaves, twigs and moss to appellant's property, was asked on cross-examination, without objection, if, in a conversation with one Johnston, he (witness) said he saw two men running away from the fire (on appellant's land), and that Johnston said, "Why didn't you shoot them?" The witness answered he did not; that, while he thought he knew Johnston, he never had talked with him. Thereafter, in respondent's proof, Johnston was permitted, over appellant's objection, to testify that, at a certain place, naming it, two or three days after the fire, the conversation above referred to occurred between Bauguess and himself in the course of a long talk.

Permitting Johnston to thus testify is appellant's first assignment of error. The whole purpose and effect of the testimony of Bauguess was to show that the fire on appellant's land had been conveyed by live sparks and cinders carried by the wind from the fire on respondent's land; and the testimony objected to was proper, we think, as tending by reasonable inference to contradict his present version of it. It is an application of the rule that statements made by a witness tending to contradict his present account of the same affair are admissible as affecting the weight and value of his testimony. *French v. Seattle Traction Co.*, 26 Wash. 264, 66 Pac. 404. Respondent's claim that time and place were not fixed in the question asked Bauguess is unavailing, for the answer of the witness

was of such a character as would of itself excuse a failure to fix the time and place; and immediately thereafter appellant's counsel had Mr. Bauguess repeat; "In regard to conversations with Johnston; I never talked to the man. I think I knew him when he passed by on the locomotive and have spoken to him, but I never talked to him." The purpose of the rule is:

"That the memory of the witness shall be so refreshed by the necessary inquiries as to enable him to explain, if he can and desires to do so. Whether this has been done is for the court to determine before the impeaching evidence is admitted." Wharton's Law of Evidence (3d ed.), vol. 1, § 555; *The Charles Morgan*, 115 U. S. 69.

Clearly, after the witness had repeated that he hardly knew Johnston, and that he had never had a talk with him, there was no error in allowing the testimony of Johnston.

It appears that the camps of each the appellant and respondent contained many members of the Industrial Workers of the World, and that, about a month before the fire, they brought on a strike and caused all of the camps to be closed; that, after the strike commenced, about forty members of the I. W. W. camped at a place about one and one-half miles south of the logging works of appellant and respondent, and that two or three of them also camped near the place where the fire originally started east of the river. Over appellant's objection, the court received testimony that these strikers were daily seen going through the various camps of the respective parties hereto; that they picketed those camps and refused to allow any person to go to work therein; that some of their leaders had stated that the logging camps should not start without their consent, and that, if there was any effort to start them, the lines would fall to pieces by reason of a

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chemical poured on them, and that they would destroy other things; that at least one member of that organization had said he preferred "direct action"; that, about the time the fire began, a strange man was seen starting a fire on the appellant's side of the river. It is now claimed that the court erred in receiving all of this testimony.

The appellant had introduced testimony tending to show that the fire was started by the negligent operation of one of respondent's engines. To meet this charge respondent had a right to introduce testimony which reasonably tended to show that the fire had been started in other ways. The real question being tried was the origin of the fire, and any testimony which gave light to that subject was competent. It was, of course, perfectly competent to show that persons not connected with the respondent were camping in the neighborhood and were constantly passing through respondent's works and that the fire may have started through their negligence. The appellant, however, particularly objects to the receipt of testimony tending to show the threats and general conduct of the members of the I. W. W. It may be conceded that evidence of mere isolated threats is generally not admissible, for the reason that it has no tendency to establish the innocence of the defendant; but where, as here, there was proof that the fire occurred on the very day the respondent started its operations in opposition to the wishes of the I. W. W., and that many members of that organization were in the immediate neighborhood and could easily have been present and were in position to carry out their threats, we think the testimony concerning the threats was admissible. It is not necessary that every fact should bear directly on the issue, but it becomes admissible if it tends to prove the issue or constitutes a link in the chain of proof. The rule only excludes evidence

of collateral facts which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. In all, or nearly all, of the cases cited by the appellant to this point there was an effort on the part of defendant to prove threats made by some third person, without any showing that such third person was capable of carrying out the threat, or was in that immediate vicinity or neighborhood at the time of the commission of the crime charged against him. Such is the case of *State v. McLain*, 43 Wash. 267, 86 Pac. 390, 10 Ann. Cas. 321, cited and greatly relied on by the appellant. It has been held that, where there was a doubt as to who committed the crime with which a defendant was charged, threats made by a third person were admissible in evidence although there was no other evidence on the subject. *Leonard v. Territory*, 2 Wash. Terr. 381, 7 Pac. 872; *Murphy v. State*, 36 Tex. Crim. 24, 35 S. W. 174; and particularly is such testimony admissible where it is shown that the person making the threat was in the immediate vicinity at the time the crime was committed. *Hensley v. State*, 9 Hump. (Tenn.) 243; *Commonwealth v. Abbott*, 130 Mass. 472; *State v. Taylor*, 136 Mo. 66, 37 S. W. 907; *Horn v. State*, 12 Wyo. 80, 73 Pac. 705.

The chief question must usually be whether there is sufficient testimony to connect reasonably the person making the threat with the act charged to have been done. The general rule is clear. The difficulty is in applying the rule to the testimony. In this regard every case must stand on its own bottom. If the testimony objected to is to be believed, we have certain men threatening to destroy property if the logging camps are started without their consent; the starting of respondent's camps against their wishes; the occurrence of the fire on the very day the camps start; the presence of the men making the threats at the time of the fire;

the fact that a stranger was seen apparently in the act of starting a fire; the intimation that other strange men were seen running from the place where the fire originally started; the failure of the testimony to positively and definitely point out the cause of the fire. We concede that it could be argued that this testimony fails to prove that these men started the fire; and so could the contrary be argued. There were, at least, facts sufficient to require the matter to be submitted to the jury. Particularly is this true where, as here, the trial court in instructing the jury called their attention to this testimony and told them that "the only purpose for which you can consider this testimony is in so far, if at all, as it bears upon the origin of the fire."

It cannot be said, as a matter of law, that this testimony wholly failed to raise any reasonable inference that the men making the threats were connected with the consummation thereof.

Assignments of error Nos. 3, 4 and 14 are disposed of by what has been said under assignment No. 2.

Assignment No. 5 relates to an effort on the part of appellant to present testimony on rebuttal tending to show that at least one of the I. W. W. had, before the fire, stated that they desired to avoid fires and that the members of that organization were friendly with the appellant. The court permitted testimony tending to show the friendliness, but refused that offered for the purpose of showing that they desired to avoid fires. We think there was no error against appellant in this ruling. To prove that the I. W. W. expressed friendliness to the appellant and desired to co-operate in avoiding fires did not tend to dispute respondent's testimony concerning threats and the ability to carry them out.

Assignment No. 15 affects the same general question

and may be noticed here. Appellant requested an instruction to the effect that the jury should not consider any evidence of the presence of members of the I. W. W. at the time of the fire unless they found from other testimony that the fire on the east side of the river was caused by them. It is claimed the court erred in refusing to give this request. The purpose of this requested instruction is not clear to us. It is, however, argued that it should have been given because the fact that the I. W. W. were in the vicinity was an immaterial matter unless there was other evidence tending clearly to point to them as responsible for the fires. If it means this it was too broad. If the request had been to the effect that the mere presence of the I. W. W. would have been immaterial unless there was testimony tending to connect them with the fire, it might have been proper. But we think the court was right in refusing the request as made.

Assignment No. 6 refers to objections made to a remark of opposite counsel in the course of examining a witness. While the remark may not have been altogether proper, it was harmless and could not have prejudiced the jury. Besides, the court in its general instructions cautioned the jury against any remarks made by the attorneys which were not borne out by the testimony.

Assignments Nos. 7, 8 and 9 relate to the rejection of testimony offered by appellant as to the direction of the smoke from the place where the fire originated. The distances and situations of the witnesses were such that any testimony they may have given would have been not only cumulative, but of such little probative value that there was no prejudicial error in rejecting it.

One of appellant's witnesses, and probably one of respondent's witnesses, testified that the fire started

on both sides of the river at about the same time. Appellant offered to prove by one Joy that, on the day of the fire, he was in Seattle, and that the witnesses above mentioned talked with him over the telephone and stated to him that the fire was then burning on the west side of the river, but had not at that time reached the east side thereof. The court rejected this offer. We will not undertake to follow appellant's argument in detail on this question. We have, however, carefully considered it and have concluded the ruling of the court was not erroneous. It was justifiable, among other reasons, because the testimony would have been cumulative. Prior thereto many witnesses for the appellant had testified on this identical subject. It was discretionary with the trial court whether more of like testimony should be received.

Assignment No. 11 refers to the refusal of the court to allow certain questions on the cross-examination of respondent's witness Taylor. He was superintendent of respondent's camp, and in chief had testified that he was at the original fire shortly after it started on respondent's land, and that the wind and smoke were going in a southerly direction and at no time in the afternoon blew across to the east side of the river. On cross-examination, having admitted that, during the progress of the fire, he telephoned to the foreman of a camp of respondent, situated some distance east and on the other side of the river, he was asked if, during that conversation, he did not ask the foreman whether there was fire on the east side, and if the foreman did not ask the witness what should be done about getting out some of the property at that camp, and if the witness did not reply: "I can't tell you anything to do now except to save yourself." Objections to the questions were sustained as not being proper cross-examination. The ruling was right. All the witness had

testified in direct examination was that during the afternoon the wind was not blowing sparks or smoke easterly across the river, but that it was blowing south. The question asked on cross-examination sought to bring out that the witness had asked the foreman if there was any fire east of the river and that he told him to save himself. These questions touched on matters entirely foreign to anything brought out by the direct examination. Besides this, if they had been answered in the affirmative, it would have been entirely immaterial. All the testimony showed that there was a destructive fire on the east side of the river during that afternoon, and there was no showing during what time in the afternoon the telephoning was done. The fact that there was a fire on the east side and that the witness had told the foreman to save himself, could not possibly lend light to the question whether the east side fire came from the west side fire, or whether smoke and cinders were blowing across the river.

Assignment No. 12 presents what we consider a too critical complaint against a portion of one of the instructions to the jury. We think the instruction correct and in no way misleading.

Assignment No. 13 draws in question the concluding language of one of the written instructions, whereby, in effect, the jury were told to disregard statements the court may have made during the trial as to the law applicable to the issues, and that the written instructions contained all the law the jury were at liberty to consider in arriving at their verdict. We think the language complained of not at all erroneous, taken in connection with all of the written instructions, and certainly not objectionable for the reason suggested by appellant, to the effect that the jury might become confused and feel at liberty to consider testimony that had been stricken out; for, in another portion of the writ-

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ten instructions, the jury were told to disregard all evidence which had been stricken out by the court.

The 16th assignment relates to the denial of appellant's motion for a new trial, and requires no distinctive consideration.

We do not find any reversible error. The judgment is affirmed.

HOLCOMB, C. J., MACKINTOSH, FULLERTON, MAIN, MOUNT, TOLMAN, and PARKER, JJ., concur.

[No. 15724. Department Two. September 1, 1920.]

THE BOARD OF DIRECTORS OF THE HORSE HEAVEN
IRRIGATION DISTRICT, *Respondent*, v. E. D.
MINEAH, *et al.*, *Respondents*, VERMONT
LOAN AND TRUST COMPANY
et al., *Appellants*.¹

WATERS AND WATER COURSES (89)—IRRIGATION DISTRICTS—ESTABLISHMENT—ESTIMATE OF COST—STATUTES. Bonds of an irrigation district are not invalid for failure of the board of directors to sufficiently comply with Rem. Code, § 6430, requiring the board to "estimate and determine the amount of money to be raised" before calling an election for the issuance of bonds, where the estimate of the cost of the project was made upon information obtained through investigation and surveys made by a competent engineer appointed by the board, whose work was checked over and approved by engineers and attorneys appointed for that purpose, since the statutes vest the board of directors with large discretion, and contemplate that they shall have before them such information as will enable them to make a fair, honest and reasonably accurate estimate.

SAME (91)—BONDS—ISSUANCE AND DELIVERY—EFFECT OF ANTE-DATING—INTEREST ON BONDS. Bonds of an irrigation district dated January 1, 1918, but not issued and delivered until January 25, 1918, are not void because ante-dated and in violation of Rem. Code, § 6430, requiring that they shall "bear date at the time of their issuance"; since "date of issue" when applied to notes, bonds, etc., of

¹Reported in 192 Pac. 997.

a series, means the date fixed as the beginning of the term for which they run, without reference to the time of their sale or delivery, the testimony showing that the accrued interest was adjusted at the time of their sale and delivery.

SAME (89)—PROCEEDINGS TO ESTABLISH—POWERS OF OFFICERS—STATUTES. The board of directors of an irrigation district have authority to purchase from an irrigation company its surveys, notes, water rights, etc., and to pay for the property by the delivery of bonds of the district, under Rem. Code, § 6427, and the discretion of the board in making the purchase will not be questioned, in the absence of arbitrary conduct or fraud.

SAME (91)—BONDS—VALIDITY—PLACE OF PAYMENT—DESIGNATION IN BONDS. Rem. Code, § 6430, requiring that the principal and interest of irrigation district bonds "shall be payable at the place designated therein," does not prevent the board of directors from designating more than one place for payment, such being the general custom when issuing bonds, and greatly enhancing their value because of the convenience to buyers.

SAME. Such designation in the bonds, making them payable outside the district, does not violate Const., art. 11, § 15, providing that "all moneys of any public or municipal corporation shall be deposited with the treasurer, or other legal depositary, to the credit of the city, town or other corporation"; since if the directors exceeded their powers, the buyers must be held charged with the knowledge thereof, and the provision, in that event, would be merely surplusage and not affect the validity of the bonds.

Appeal from a judgment of the superior court for Benton county, Truax, J., entered September 3, 1919, upon findings in favor of the plaintiff, confirming the regularity and legality of certain irrigation district bonds, tried to the court. Affirmed.

A. E. Gallagher, and *Hamblen & Gilbert*, for appellants.

Carroll B. Graves and *Peters & Powell*, for respondents.

BRIDGES, J.—The Horse Heaven Irrigation District was organized under the laws of the state of Washington concerning irrigation. The district comprises more than 300,000 acres, located in Benton, Klickitat and

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Yakima counties, in the state of Washington. These lands occupy a plateau partly bounded by the Yakima and Columbia rivers. Prior to the organization of this district, the Klitckitat Irrigation & Power Company had made extensive researches with a view to irrigating at least a part of the lands within the present district. After receiving reports of its engineers, the board of directors of respondent district estimated and determined that it would cost \$18,250,000 to carry out the project of bringing water to the district in quantities sufficient to irrigate the lands therein, and called an election for the purpose of determining whether the district should issue its bonds in the sum of \$18,250,000 for the purpose mentioned. The vote at this election was favorable to the issuance of the bonds. Thereafter the district purchased, for the sum of \$200,000, all of the maps, plats, surveys, water rights, etc., of the Klickitat Irrigation & Power Company, and delivered to that company its bonds of the par value of \$222,200 in payment therefor. As we understand it, most, if not all, of the remainder of the authorized bonds are still unissued and unnegotiated. This action was brought by the irrigation district for the purpose of having the court confirm the regularity and legality of all these bonds. The trial court found the bonds already negotiated, and those authorized to be issued, to be valid, and entered a judgment to that effect. From this judgment, an appeal has been taken. A prior action had determined the regularity and legality of the formation of the district.

The appellants here do not contend that there was any fraud connected with the subject-matter of this action, nor do they contend that any of the proceedings concerning the election for the authorization of the bonds were irregular, but they do contend that the

bonds are invalid for several reasons, which we will now consider.

(1) Appellants contend that the adoption of a plan or system in intelligent form was a condition precedent to the right of the directors of the district to make any estimate of the amount of money to be raised, or to call an election to vote upon the bonds, and that such board had not so done. This contention is based upon that part of § 6430 of Rem. Code, which provides that, for the purpose of construction, reconstruction, betterment, extension or acquisition of the necessary property and rights, the board of directors of any such district must "estimate and determine the amount of money to be raised, and shall thereafter call a special election." The irrigation district statutes of this state are very liberal and vest the board of directors of the district with large discretion. It seems to have been the intent of the legislature to bind such boards with as few technicalities and to surround them with as few limitations and restrictions as possible. The statute does not require that the "estimate" shall be based on any exact information or on any full and complete plans and specifications. It does not mean that, before making such estimate, the board must know and be able to point out the exact cost of the various items to be included within the estimate. It contemplates that the board shall have before it such information as that it may make a fair, honest, intelligent and reasonably accurate estimate. Nothing more is necessary. Indeed, the statute makes provision for supplying additional funds in the event the amount estimated shall prove to be insufficient, and it anticipates that it may not be necessary to negotiate all the bonds which have been authorized.

Let us see if the estimate made by the board of directors meets the requirements thus stated.

Many years prior to the making of such estimate, and, in fact, prior to the organization of this present district, the Klickitat Irrigation & Power Company made extensive surveys and investigations, through competent engineers, with a view to bringing water to the lands in question. It had many plats, plans and specifications, water measurements, water appropriations, water rights and surveys, and much more useful information. Upon its organization, respondent appointed an experienced and competent engineer to make surveys and investigations with a view to bringing waters to irrigate the lands within the district. After much intelligent investigation, this engineer reported that the water to irrigate these lands must come from the Klickitat river and could not come from any other source; that he had carefully checked the surveys and recommendations of the engineers of the Klickitat Irrigation & Power Company and found them substantially correct, and recommended the purchase of all the maps, plats, survey notes, property and rights of that company for the sum of \$200,000. Thereafter the respondent, through its board of directors, appointed a board consisting of two prominent and experienced engineers and two attorneys at law for the purpose of checking the work of its previous engineer and reporting thereon to the board. After extensive investigation these gentlemen reported, confirming almost entirely the report of the board's first engineer, including his recommendation concerning the purchase from the Klickitat Irrigation & Power Company. They estimated that \$18,250,000 would be necessary to carry out the project. Thereafter, possessed of all the information so obtained, the board of directors estimated and determined that the cost of the project would be \$18,250,000, and called an election to vote on bonds of the district in that amount.

Unquestionably the board of directors had such information as that it could honestly and intelligently, and considering the magnitude of the proposition, quite accurately, estimate the cost of the project.

Appellants chiefly rely on the case of *Cullen v. Glendora Water Co.*, 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047. That case involved what is called the Wright Irrigation Statute of California, from which our statute was originally largely copied. In that case the board of directors had made an estimate of the cost of irrigating the lands within the district. It appeared, however, that, when the board made this estimate, it had made no surveys and almost no investigation; it did not know from what source it could procure water; did not know whether it would undertake to purchase water rights already in use, or undertake to obtain the water from other sources, and, in fact, had no information upon which it could make an intelligent estimate. The court held that the estimate made by the board of directors was not that contemplated by the statute. It is manifest that there is a great difference between the facts of that and the facts in this case. This question, however, is not an entirely new one in this court. In the case of *Hanson v. Kittitas Reclamation Dist.*, 75 Wash. 297, 134 Pac. 1083, this court considered the provision of the statute which we are now discussing. We said:

"It is pointed out that, by the provisions of the statute, the board of directors of the district, before calling an election for the issuance of bonds, must estimate and determine the amount of money to be raised by the district; and it is argued that no estimate other than a sham and fictitious estimate could be made by the board of directors for the reason stated in the allegation of the complaint from which we have quoted, namely, that there was no known source from which water for irrigation purposes could be acquired by the

district except from the government of the United States, and as to this source an irreconcilable conflict in the laws between the state and Federal government rendered it unavailable."

After discussing whether it was probable that arrangements could be made with the government concerning obtaining water, we further said:

"It would seem, therefore, that the possibility of obtaining a water supply is not so remote or uncertain as to render it impossible for the board of directors of the district to make a reasonably accurate estimate of the cost thereof. It was not intended by the statute that the estimate be more than this. The board of directors could not, prior to making such estimate, safely enter into contracts for the purchase of water or the construction of irrigating canals and ditches. The law provides no other means for raising funds to meet expenditures for such purposes than the issuance and sale of bonds, and as the estimate of cost must be made before the issuance of bonds can be authorized by a vote of the district, common prudence dictates that no binding obligation be entered into for the expenditure of money prior to the time it is known with certainty that the money is forthcoming. We find, therefore, no reason for the conclusion that the bonds are void for want of a proper estimate. . . . The board of directors are clothed by the statute with a wide discretion as to the manner in which they shall manage the business of the district, and the courts are not warranted in interfering on any mere question of good business policy. Nothing short of a gross abuse of their powers will warrant such an interference."

In the case of *Board etc. Quincy Valley Irrigation Dist. v. Scott*, 79 Wash. 434, 140 Pac. 391, we said:

"The requirement is that the board of directors shall make the estimate, and when they in good faith make such an estimate, and their estimate is approved by the qualified electors of the district, all is done that is necessary to constitute a compliance with the statute."

We therefore conclude that the estimate was sufficient.

(2) Appellants contend that the bonds negotiated to the Klickitat Irrigation & Power Company in the sum of \$222,000 are void because they are ante-dated. Those bonds are dated January 1, 1918, but were not issued and delivered until January 25th of the same year. The argument is that, because of the ante-dating, the time the bonds are required by statute to run, to wit, twenty years, is shortened by twenty-five days, and that the provision of the statute providing that the bonds must not draw to exceed six per cent interest is violated, because, since the bonds draw interest at six per cent, and since the first semi-annual payment of interest would be for a period less than six months, the interest during that six months would be in excess of six per cent. Section 6430, Rem. Code, provides that "Every bond of each issue shall be numbered consecutively and bear date at the time of their issuance." The appellants contend that the bonds were "issued" at the time of delivery, and cite a number of cases to support that theory. An examination of those cases shows that they are not in point here. But it is not necessary to discuss them because this question has been before this court in the case of *Yesler v. Seattle*, 1 Wash. 308, 25 Pac. 1014. That case construed a statute authorizing bonds for municipal internal improvements. It provided that the bonds should "bear the date of their issue." The bonds in question were dated July 1, 1890, and were actually delivered after that date. Discussing the meaning of the word "issue" we said:

"In financial parlance the term 'issue' seems to have two phases of meaning. 'Date of issue,' when applied to notes, bonds, etc., of a series, usually means the arbitrary date fixed as the beginning of the term for which they run, without reference to the precise time when

convenience or the state of the market may permit of their sale or delivery, and we see no reason why the act of March 26, 1890, should not have that interpretation. When the bonds are delivered to the purchaser, they will be 'issued' to him, which is the other meaning of the term. Usually the question of interest from the date of issue to the time of sale of bonds is adjusted by payment of the face and interest by the purchaser, or the removal of coupons."

What we said in that case with reference to the statute there involved is peculiarly applicable to the statute under discussion here, because this statute expressly provides that the interest on bonds shall be payable on the first days of January and July of every year. If appellants' contention is correct, then the board of directors would be required, probably at great sacrifice, to actually sell and deliver its bonds on either January 1 or July 1. Manifestly the legislature did not intend to require such an absurdity. Nor is there merit in appellants' contention that, because of the so-called ante-dating, the bonds will draw in excess of six per cent interest. The testimony shows that, when they were sold and delivered to the irrigation company, the accrued interest was adjusted. We cannot conclude that there is any irregularity in the issuance of these bonds because of their being dated on a day prior to the actual delivery. As bearing upon this question, see the following cases: *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. 399; *Smith v. State*, 99 Miss. 859, 56 South. 179, 35 L. R. A. (N. S.) 789; *Rock Creek v. Strong*, 96 U. S. 271; *Morrill v. Smith County*, 89 Tex. Sup. 529, 33 S. W. 899; *State ex rel. Hoffman v. Moore*, 46 Neb. 590, 65 N. W. 193; *Syracuse Township v. Rolins*, 104 Fed. 958; *Solon v. Williamsburgh Savings Bank*, 35 Hun 1; *South St. Paul v. Lamprecht Bros. Co.*, 88 Fed. 449.

(3) The appellants further contend that the board of directors did not have authority to purchase from the Klickitat Irrigation & Power Company its surveys, notes, water rights, etc., and therefore had no authority to pay for that property by delivering the bonds of the district. Section 6427, Rem. Code, provides that the board of directors of any such district shall

“have the power to acquire, either by purchase or condemnation, or other legal means, the lands, waters, water rights and other property necessary for the construction, use, supply, maintenance, repair and improvement of said canal or canals and irrigation works, including canals and works constructed or being constructed by private owners, or any other person, lands for reservoirs, for the storage of needful waters, and all necessary appurtenances. The board may also construct the necessary dams, reservoirs and works for the collection of water for said district, and may enter into contracts for a water supply to be delivered to the canals and works of the district, and do any and every lawful act necessary to be done in order to carry out the purposes of this act; and in carrying out the aforesaid purposes the bonds of the district may be used by the board, at not less than 90% of their par value in payment.”

We have no doubt that, under the authority of this section of the statute, the board was acting well within its powers when it purchased the property from the irrigation company and paid bonds therefor. The California cases cited by appellants in support of their contention are not in point. The California statute, at the time of the decision of those cases, was much more limited than the present Washington statute. The original irrigation district act of this state was substantially the same as the California act, but there have been many amendments to our act with the view of enlarging the powers of the districts, as well as

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overcoming certain objections founded upon the very cases which the appellants have cited.

Whether the board acted with proper discretion and judgment when it made the purchase is not for us to determine. The legislature has vested in it that power and we have no authority to question its judgment, in the absence of arbitrary conduct or fraud. *Hanson v. Kittitas Reclamation Dist., supra.*

(4) The appellants further contend that the bonds show on their face that they are void. This argument is based upon the ground that the bonds contained a provision reading as follows: "Said principal sum and the interest thereon are payable . . . at the office of the county treasurer of Benton county, in the state of Washington, United States of America, or at the option of the holder thereof at the Equitable Trust Company in the city and state of New York." The statute provides that the principal and interest of the bonds "shall be payable at the place designated therein." It is contended that the board of directors exceeded its statutory powers in making the bonds payable at more than one place. The requirements of the statute that the bonds shall be payable at a place designated does not mean that the bonds may not designate more than one place for payment. It is well known that it is the general custom to make bonds payable not only at the place where they are issued, but in the city of New York or other financial center. Such provision, because of its convenience to buyers, greatly enhances the value of the bonds.

But it is further contended that the bonds are invalid for the reason that they are made payable outside of the district which issues them. It is said this violates § 15, art. XI, of the state constitution, which provides that

"All moneys . . . of any . . . public or municipal corporation . . . shall immediately be de-

posited with the treasurer, or other legal depository, to the credit of city, town or other corporation respectively”

This argument is based upon some California cases. The case of *Yarnell v. Los Angeles*, 87 Cal. 603, 25 Pac. 767, holds that an act of the legislature of California directing city councils to appoint as depositories of the public moneys, banks offering the highest rate of interest, was in violation of § 16, art. XI of the constitution of that state, which was substantially the same as § 15, art. XI of our constitution. We have had public depository statutes in this state for many years and they have been before this court. We have not been cited to any case from this court, nor have our researches found one, where such statutes have been declared unconstitutional or their constitutionality questioned. It would not appear, however, that the *Yarnell* case is in point on the question involved here, were it not for the case of *Los Angeles v. Teed*, 112 Cal. 319, 44 Pac. 580, where it was held that an act of the legislature of California authorizing bonds of municipalities to be made payable at a place other than the city treasurer's office (in that instance in the city of New York) was in conflict with the above mentioned constitutional provision. The *Teed* case is based entirely on the reasoning of the *Yarnell* case, *supra*. However interesting it might be to discuss the principles upon which these California cases are based, we do not find it necessary to do so here. If it should be conceded that the board of directors of the district did not have the power to make the bonds payable in New York city, as well as within the district, then the provision with reference to the payment in New York would simply be surplusage and could not have the effect of nullifying the bonds. *Johnson v. Stark County*, 24 Ill. 75; *Sherlock v. Winnetka*, 68 Ill. 530; *Enfield v. Jordan*, 119 U. S. 680;

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Skinker v. Butler County, 112 Mo. 332, 20 S. W. 613. Bond buyers are charged with notice of the laws of the state granting power to make the bonds. If the officers of the respondent district exceeded their powers in making the bonds payable in New York, the buyers thereof must be held to have known it. They could not enforce a provision which they must know the district had no power to incorporate in the bonds. *Anthony v. Jasper County*, 101 U. S. 693; *Cuddy v. Sturtevant*, 111 Wash. 304, 190 Pac. 909.

We find nothing which would invalidate the bonds. The judgment is affirmed.

HOLCOMB, C. J., TOLMAN, MOUNT, and FULLERTON, JJ., concur.

[No. 15677. Department Two. September 3, 1920.]

G. A. McCARTY, *Respondent*, v. CALIFORNIA FARMS
COMPANY, *Appellant*.¹

VENDOR AND PURCHASER (30)—CONTRACT—CONSTRUCTION—SUBJECT-MATTER—TITLE TO CROPS. A vendee is entitled to crops growing on lands purchased in January under a contract providing that title would be given within thirty days from acceptance of contract and receipt of first payment with a crop mortgage as security, the vendor stating that he would not be surprised if the purchaser realized the full price of the land from the crop.

SAME (182)—BREACH OF CONTRACT—FAILURE TO CONVEY TITLE—DAMAGES. Where the vendor refused to convey title merely for the purpose of obtaining the crop then growing upon the land, the vendee was entitled to recover his actual damages as measured by the difference between the contract price of the land and its value as enhanced by the crop, together with the money paid on the contract and his expenses.

APPEAL (451) — REVIEW — HARMLESS ERROR — ADMISSION OF EVIDENCE. Error in the admission of evidence as to the measure of damages is harmless in an action tried to the court, where the court did not consider it in fixing the damages.

¹Reported in 192 Pac. 882.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered May 19, 1919, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Davis & Heil, for appellant.

Post, Russell & Higgins, for respondent.

MOUNT, J.—This action was brought to recover damages for a breach of a contract of sale of real estate. The action was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff for \$1,862.50. The defendant has appealed.

It appears that the appellant is a California corporation maintaining an office at Spokane, in this state, engaged in the sale of lands in the state of California. The respondent, in December of 1917, at the solicitation of one Frank Smith, an agent of the appellant, in company with Mr. Baymiller, who was secretary of the appellant corporation, went to the vicinity of Orland, in California, for the purpose of looking over some land there with the idea of purchasing a portion of such land. After they had reached Orland, respondent was shown 165 acres of land in the vicinity of Orland. Thereafter the parties entered into an agreement as follows:

“This agreement, entered into this 5th day of January, 1918, between the California Farms Co., party of the first part, and G. A. McCarty, of Rosalia, Washington, party of the second part.

“It is understood that you have this day made an offer of \$50 per acre on the 165 acres lying north of the so-called olive field, being a part of the Reed Ranch, owned by the Midland Counties Land & Irrigation Co. The sum of \$500, together with this contract, shall be placed in escrow, and if this offer is accepted, the money shall be turned over to the California Farms

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Co., this shall then form a binding agreement between us.

"The terms of this agreement shall be as follows: The price of \$50 an acre is to be paid—\$3000 (of which \$500 is hereby acknowledged) upon acceptance of this agreement. \$1,125 on September 1, 1918, balance to be paid in five equal annual installments, the first of which is to be paid on September 1, 1919; deferred payments shall draw interest at the rate of 6% per annum, payable on September 1 of each year. In the event of non-acceptance of this contract the \$500 to be returned to party of second part. Upon receipt of the \$3,000 and the \$1,125, we agree within thirty days to give a grant deed, conveying marketable title to the land above described, and a certificate of title showing the same to be free and clear, except as to the mortgage, which you shall give us at the time deed is given to secure balance of the payment.

"If this is your understanding of the agreement, you will please endorse your name in the space below provided, and upon acceptance by party of the first part shall become a binding agreement upon us.

"California Farms,

"By W. H. Baymiller,

"G. A. McCarty."

At the time this contract was made, respondent gave appellant his check for \$500 to be placed in escrow with the contract pending an acceptance of the offer. A few days thereafter appellant accepted the terms thereof and cashed the check. Soon thereafter Mr. Baymiller returned to Spokane. Mr. McCarty also returned to Spokane and had a conversation with the agent Smith, in which Mr. McCarty requested a deed for the land. Thereupon Mr. Baymiller wrote to Mr. McCarty a letter as follows:

"Spokane, Washington, Jan. 19, 1918.

"Smith advised me that you wanted to get deed and certificate of title to the 165 acres. I am writing Mr. Harden to send deed with certificate of title together

with mortgage for \$4,125 on the property. The certificate of title to show the release from the bank. These papers to be escrowed in the Old National Bank of Spokane with the instructions to be turned over to you upon receipt of the further sum of \$2,500 and a crop mortgage for \$1,125. I assume this is as you wished. It may take a little time to get the certificate of title brought up to date, but in the meantime, our contract will stand. Or, if you prefer you can have a contract made direct from the owner to you covering these points.

"I just returned from the ranch day before yesterday, and since you left, we have had two fine rains, together with a lot of warm weather, and I have never seen grain grow so fast in my life. The old timers there tell me we have the largest crop prospects they have ever seen. We are unique in this prospect too, as practically all the rest of California is short of rain and present indications are for \$3 barley. It wouldn't surprise me a bit if you can take the full price of that land off of this crop.

"I feel satisfied that you will get somewhere between 17 and 20 sacks to the acre. I consider that you have made the best buy that we have had on the ranch, and I wish also to say that we have some job getting the deal through on that basis."

In reply to this letter Mr. McCarty wrote to Mr. Baymiller as follows:

"Rosalia, Wash., Jan. 22-18.

"Yours of the 19th inst. received and in reply will say that I will be in Spokane in a few days and will call at your office, and am ready to settle as per contract when I am satisfied title to land is all O. K."

Thereafter Mr. McCarty called upon Mr. Baymiller in Spokane and was informed that the papers were not yet ready. Mr. McCarty then, in order to complete the contract, made another trip to California to get possession of the land. On this trip he took with him \$2,775, \$2,500 of which was to make the payment pro-

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vided for. He deposited this money in the bank in Orland, where he was introduced by the bookkeeper of the appellant company. While in California he was informed that the company could not then make title to the land and that they refused to carry out the contract. He thereupon returned to Spokane and brought this suit for damages, with the result as above stated.

A number of assignments of error are discussed in the appellant's brief, but the principal point, and the one upon which the case turned, was whether the crop of barley which was then growing upon the land should go with the land.

Mr. Smith, who was a sales agent of the appellant company, testified that, in offering the land for sale, the crop of barley then growing upon the land was to go with the land. The respondent testified to the same effect, and that the \$1,125 mentioned in the contract was to be secured by a crop mortgage upon the crop of barley then growing upon the land. It will be noted that the contract above quoted does not mention the crop growing upon the land. It recites that, "upon receipt of the \$3,000 and the \$1,125, we agree within thirty days to give a grant deed, conveying marketable title." So we think it is apparent from the contract that the deal was to be closed within thirty days, because it is provided in the contract that the balance of \$2,500 upon the \$3,000 was to be paid upon the acceptance of the agreement, and \$1,125 on September 1.

After the contract was entered into, the parties agreed that it was not necessary to pay the \$2,500 as provided in the original agreement, because the contract was modified by the letter of January 19, above quoted, so that one-half of the purchase price of the property was to be paid when the papers were escrowed in the Old National Bank and were then to be turned

over to the respondent upon receipt of the sum of \$2,500 and a crop mortgage for \$1,125. We think it is apparent from these provisions that it was intended that the title to the property should be conveyed to the respondent within the thirty days, or at least as soon as the papers could be prepared and sent to Spokane. It is apparent too, from the letter dated January 19, that the barley crop was to go with the land, because the letter states, "it wouldn't surprise me a bit if you can take the full price of that land off of this crop. I feel satisfied that you will get somewhere between 17 and 20 sacks to the acre." From this statement in the letter of January 19, it follows that the appellant intended to, and did, sell to the respondent, by the terms of the contract and letter, not only the land, but the barley crop which was then growing upon the land. When the respondent insisted upon the contract being carried out as indicated by the letter of January 19, the appellant refused to convey the property according to the terms of the contract because it contended that the barley crop did not go with the land. We conclude upon the whole record that the crop was intended to go with the land, and the breach of a contract was made by the appellant when it refused to deliver the deeds as stated in the contract and in the letter modifying the contract. We are also satisfied that the appellant acted in bad faith in not conveying the land to the respondent as it had agreed to do. Upon the trial of the case it was conceded that the appellant had the ability to convey title to the land but it refused merely for the purpose of obtaining the crop which was then upon the land. Respondent was therefore entitled to recover his actual damages, which were the difference between the contract price and the enhanced value, which the court found was the value of the crop, and

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also the money paid upon the contract and his expenses. *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614.

Appellant argues that the court erred in receiving in evidence testimony with reference to the price of barley in San Francisco during the year 1918. We think it is unnecessary to notice this contention further than to say that this evidence, while admitted by the court, was not considered in arriving at its conclusion. It was conclusively shown upon the trial, if not conceded, that the value of the barley crop upon this land in January was \$7.50 per acre. The court, instead of following the evidence with reference to the price of barley and the quantity produced upon the land, concluded that the barley growing upon the land was worth \$7.50 per acre and gave judgment for that amount.

The trial court also gave judgment for the expenses of the respondent in making his trip to California in an effort to obtain title, and also for the \$500 which he had advanced in payment of the land. These items added together made the amount of the judgment which was entered.

We are satisfied upon the whole case that the judgment entered was right. It is therefore affirmed.

HOLCOMB, C. J., FULLERTON, BRIDGES, and TOLMAN, JJ., concur.

[No. 15764. Department Two. September 3, 1920.]

THE STATE OF WASHINGTON, *on the Relation of W. V. Tanner, Attorney General, Plaintiff, v. CASPER STAEHEL et al., Respondents.*¹

ALIENS (2)—TITLE TO REAL ESTATE—CITIZENSHIP—DECLARATION OF INTENTION—GOOD FAITH—EVIDENCE—SUFFICIENCY. An alien's declaration of intention to become a citizen was not filed in good faith, as required by Const., art. 2, § 33, so as to prevent the escheat of lands purchased by the alien, where the evidence shows that he claimed an alien's right to military exemption, and later, on advice of his counsel, after the state had begun an action to escheat the lands held by him, he filed his declaration of intention to become a citizen.

SAME (3, 5)—TITLE TO REAL ESTATE—CONSTITUTIONAL PROVISIONS—EFFECT OF TREATIES. There is no conflict between Const., art. 2, § 33, prohibiting aliens from acquiring lands in this state by purchase, and the treaty of 1850 between the United States and Switzerland which provides that citizens shall be admitted and treated upon a footing of reciprocal equality in the two countries, where such admission and treatment shall not conflict with the constitutional or legal provisions of the contracting parties, and providing that citizens of each country shall have power to dispose of real property situated within the states of the Union or within the Cantons of the Swiss Confederation in which foreigners shall be entitled to hold real estate, or in case they acquire real property by inheritance which on account of being an alien they are not entitled to hold.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered July 26, 1919, dismissing an action to forfeit to the state lands held by an alien, tried to the court. Reversed.

The Attorney General, D. E. Twitchell, Assistant, and Roscoe R. Fullerton, for relator.

Zent & Jesseph, for respondents.

MOUNT, J.—This action was brought by the *Attorney General* to forfeit to the state a certain tract of land

¹Reported in 192 Pac. 991.

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in Stevens county, for the alleged reason that the defendants were aliens and not citizens of the United States and, therefore, prohibited from holding land in this state, under the provisions of art. 2, § 33, of the constitution of this state. The trial of the case resulted in a judgment of dismissal. The *Attorney General* has appealed from that judgment.

The facts, as shown by the pleadings and the proofs, are these: At the time the action was begun, the respondents were aliens, not citizens of the United States, or the state of Washington, and had filed no declaration of intention to become citizens. They acquired the land in question by purchase after the state constitution was adopted. This land is agricultural land, not valuable for minerals or used for manufacturing purposes, and was not acquired by inheritance or under mortgage, or in the collection of a debt. The respondent Casper Staeheli was born in Switzerland. After he came to this country his father, in January, 1908, was duly naturalized. After that time the respondent, supposing that the naturalization of his father resulted in making him also a citizen of the United States, exercised all the rights of a citizen until the year 1917, when he was required to respond for military service. Then, in reporting to answer his questionnaire, he concluded he was not a citizen, and claimed military exemption on that account because he was past twenty-one years of age when his father was naturalized in 1908. Thereafter, in February, 1918, the *Attorney General* brought this action. After the action was begun and while it was pending, in June, 1918, respondent filed his declaration of intention to become a citizen of the United States.

Under this state of facts, the trial court was apparently of the opinion that § 33 of art. 2 of the constitu-

tion of this state is in conflict with the treaty of 1850 between the United States and Switzerland, and that, when respondent filed his declaration to become a citizen of the United States while the action was pending, that declaration related back to the time when the respondent acquired the land. The Constitution, by § 33, art. 2, provides as follows:

“The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void: Provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition.”

We have held, under the provisions of this section, that a lease of land for ninety-nine years to an alien is void (*State ex rel. Winston v. Morrison*, 18 Wash. 664, 52 Pac. 228), and that a lease for forty-five years, made to a corporation where the majority of the stock was held by aliens, was void. *State ex rel. Winston v. Hudson Land Co.*, 19 Wash. 85, 52 Pac. 574, 40 L. R. A. 430. We have also held that the right of an alien to hold real estate contrary to the provisions of this section can be questioned by the state alone. *Prentice v. How*, 84 Wash. 136, 146 Pac. 388. See, also, *Abrams v. State*, 45 Wash. 327, 88 Pac. 327, 122 Am. St. 914, 13 Ann. Cas. 527, 9 L. R. A. (N. S.) 186. So it necessarily follows that the judgment of the trial court was wrong, unless

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the fact that the respondent filed his declaration of intention to become a citizen after the action was begun avoids the constitutional provision above quoted, or unless the treaty of 1850 with Switzerland takes the case away from this section of our constitution, because it is an admitted fact that, at the time the action was brought, the respondents were aliens holding the lands by purchase made after the constitution of the state was adopted.

It is argued by respondent in substance that, because Mr. Staeheli filed his declaration of intention to become a citizen of the United States, this declaration relates back to the time he purchased the land, and therefore the state has no right to insist upon the forfeiture of the land. A number of cases are cited to the effect that title to lands held by an alien is not lost if the alien files his intention to become a citizen or becomes naturalized before judgment, for the reason that the naturalization relates back and confirms title in the land. This is no doubt the rule where the contest is between citizens and the state itself has not begun proceedings to forfeit the title, because the state alone can question the title of real estate held by an alien. *Prentice v. How, supra*. No case has been cited to us which holds that an action to forfeit lands such as this by the state can be abated by the defendant merely filing a declaration of intention to become a citizen after the action is begun. If this be the rule, then the constitutional provision above quoted becomes of no practical effect, because any living alien may at any time avoid the constitutional provision by the very simple act of declaring his intention to become a citizen.

But in this case it is unnecessary to determine that question, for we are convinced that the declaration by respondent of intention to become a citizen was not

made in good faith as the constitution specifically requires. If the respondent is entitled to the presumption that he acted in good faith in filing his declaration, we are of the opinion that such presumption was overcome by his own admissions. It is admitted that, in the year 1917, when the government called upon him to answer his questionnaire in order to determine his status in defense of the government, he immediately discovered that he was an alien and claimed his exemption from military service because of that fact. Then, after the state brought this action, he filed his declaration of intention to become a citizen. In short, when he knew that the government required his services, he declined to act as a citizen, but when the state sought to forfeit the lands held by him on the ground that he was an alien, then, and only then, he sought to acquire the rights of a citizen. The words "good faith" used in the constitution mean good faith to the government, that he really intends to become a patriotic citizen and devote his services to the protection of his adopted country. The words "good faith" therein used do not mean for the pecuniary or selfish interest alone of the declarant. We are satisfied, therefore, that the respondent, when he declared his intention to become a citizen of the United States, did not do so in good faith to the government, but did so merely in an endeavor to avoid the consequences of this action. This view is strengthened by the fact that the respondent filed his declaration upon the advice of his counsel who then represented him in this action, the inference from this being that he did not do so of his own volition and in good faith.

It is further argued by respondents that the provision of the constitution above quoted is opposed to the

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Treaty of 1850 between the United States and Switzerland. Article 5 of that treaty provides:

"The citizens of each one of the contracting parties shall have power to dispose of their personal property within the jurisdiction of the other, by sale, testament, donation, or in any other manner; and their heirs, whether by testament or *ab intestato*, or their successors, being citizens of the other party, shall succeed to the said property or inherit it, and they may take possession thereof, either by themselves or by others acting for them; they may dispose of the same as they may think proper, paying no other charges than those to which the inhabitants of the country wherein the said property is situated shall be liable to pay in a similar case. In the absence of such heir, heirs, or other successors, the same care shall be taken by the authorities for the preservation of the property that would be taken for the preservation of the property of a native of the same country, until the lawful proprietor shall have had time to take measures for possessing himself of the same.

"The foregoing provisions shall be applicable to real estate situated within the States of the American Union, or within the Cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate.

"But in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State or in the Canton in which it may be situated, there shall be accorded to the said heir, or other successor, such term as the laws of State or Canton will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the Government any other charges than those which in a similar case would be paid by the inhabitant of the country in which the real estate may be situated."

There can be no doubt, as argued by respondent, that a treaty between the United States and a foreign

country is the supreme law of the land, and if the constitutional provision hereinbefore noted, or the laws of this state, are in conflict with the treaty of 1850 with Switzerland, then such constitutional provision and laws must give way to the treaty. The provisions of the treaty above quoted are as effective now as when they were adopted. We fail to see wherein there is any conflict between that treaty and our constitution. There was evidently no intention that the treaty should avoid or conflict with any law of either country, for article 1 of the treaty provides:

“The citizens of the United States of America and the citizens of Switzerland shall be admitted and treated upon a footing of reciprocal equality in the two countries, where such admission and treatment shall not conflict with the Constitutional or legal provisions, as well Federal as State and Cantonal, of the contracting parties.”

So it is apparent that the citizens of each country are required to conform to the laws of the other, as well Federal as state and cantonal, of the contracting parties. There is no intention to avoid or conflict with the laws of either country.

The first paragraph of article 5 of the treaty deals with personal property and provides that the citizens of each country shall have power to dispose of their personal property as they see fit, and for the descent and care of such property.

The next paragraph of that article provides:

“The foregoing provisions shall be applicable to real estate situated within the States of the American Union, or within the Cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate.”

In this state foreigners are not entitled to hold real estate by purchase. They are allowed only to hold by inheritance, under mortgage, or in the collection of

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debts in the ordinary course of justice. Real estate held by foreigners by any one of the methods by which it is lawful to hold is clearly protected by the treaty, but when real estate is held by such foreigners by purchase, or by a method which it is unlawful in the state to hold, it is not protected by this treaty, because the treaty did not intend to, and does not by words, supersede or modify any law of this or any other state in regard to real estate, but provides that the citizens shall be admitted and treated upon a footing of reciprocal equality in the two countries when such admission and treatment shall not conflict with the provisions of state law. We are satisfied this is the reasonable construction of the treaty and that it does not, and was not intended to, modify or avoid any law of the states or of the United States, especially in reference to real estate.

The last paragraph of article 5 relates solely to real estate falling by descent to heirs of the holders and has no application to the facts in this case.

The respondent Casper Staeheli came to this country and state after the adoption of the constitution. He was, therefore, bound by the laws then in force, and he purchased the property in question in direct violation of §33, art. 2, of the constitution. We are of the opinion that the declaration of intention to become a citizen of the United States was not made by Casper Staeheli in good faith as required by the constitution, and that the treaty of 1850 between the United States and Switzerland does not nullify our constitution so as to permit a foreigner to hold real estate by purchase.

It follows that the judgment must be reversed and the cause remanded for a judgment of escheat prayed for in the complaint.

HOLCOMB, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 15784. Department Two. September 3, 1920.]

NATIONAL BANK OF THE REPUBLIC, *Appellant*, v. WALKER
D. HINES *et al.*, *Respondents*.¹

BANKS AND BANKING (31)—DRAFTS—DEPOSITS FOR COLLECTION—OWNERSHIP OF DRAFT. It is conclusively presumed that a bank becomes the absolute owner of a draft where, without any other agreement, it is indorsed and delivered to the bank by a regular customer whose checking account is given credit for the full amount; and it is immaterial that the bank reserved the right to charge back the draft against the customer's account in case of nonpayment.

CARRIERS (23)—BILLS OF LADING—WRONGFUL DELIVERY OF GOODS. Where a bank held bills of lading and the property represented thereby as collateral security for the payment of a draft purchased, a delivery of the property by a carrier without surrender of the bills of lading, and acceptance by a third person, was wrongful as against the bank, since no person other than the bank had a right to the bills of lading or the property until the amount it was entitled to receive had been paid.

SAME (26). Where property represented by a bill of lading and held by a bank as collateral security for payment of the draft and bill of lading was wrongfully converted, the measure of the bank's damages is the value of the property, up to the amount of the draft, regardless of the fact that in purchasing the draft an overdraft of the seller was paid to the bank.

SAME. In such case, the bank can recover the value of the property, without deduction of the freight paid to release the property, where the defendant received the amount of the freight from another when it wrongfully converted the property and sold it to defendant.

SAME (23)—WRONGFUL DELIVERY OF GOODS—BILLS OF LADING—RIGHTS OF INNOCENT PURCHASER. In such a case, the consignee of the property represented by the bills of lading, though having paid for the property, is not entitled to possession as against the bank, where the seller had possession of the property, the bills of lading were issued to him and he delivered them to the bank, the bank having no knowledge of the arrangement between the seller and the buyer.

Appeal by plaintiff from a judgment of the superior court for King county, Dykman, J., entered November

¹Reported in 192 Pac. 899.

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29, 1919, upon findings favorable to the plaintiff in part, in an action for conversion, tried to the court. Reversed.

Donworth, Todd & Higgins, for appellant.

Reynolds, Ballinger & Hutson, for respondent Alaska Junk Company.

C. H. Winders, for respondent Hines.

BRIDGES, J.—This action was brought by the appellant against the respondent Hines, as Director General of railroads, to recover the value of three car loads of scrap iron. The amount sued for is \$2,080. Subsequently to the bringing of the action, the respondent Alaska Junk Company was made a party defendant at the demand of the Director General. The case was tried to the court without a jury, and resulted in a judgment in favor of the appellant and against the respondent in the sum of \$868.45, and also a judgment in favor of the respondent Hines and against the junk company in a like amount. The judgment further provided "that if any other further or additional judgment in this cause be entered in favor of the plaintiff and against said defendant Walker D. Hines, Director General of railroads, as operating the Northern Pacific Railway, then it is further ordered, adjudged and decreed that he do have, as against the Alaska Junk Company, a judgment for any additional amount which may be entered against him in favor of the plaintiff, on account of any of the matters and things involved in this action." It is from this judgment that the bank has appealed.

The following is the substance of the facts: The appellant is a banking institution, doing business at Salt Lake City, Utah; the respondent Walker D. Hines

was, at the time of the commencement and trial of this case, Director General of railroads; the respondent Alaska Junk Company is a corporation doing a general junk business in the city of Seattle, Washington. In June, 1918, the junk company purchased, or agreed to purchase, from one Rosenblatt, doing business in Salt Lake City, approximately 800 tons of junk to be delivered at Seattle. Prior to the delivery, the junk company paid Rosenblatt all or a substantial portion of the contract price. There was an understanding between them that the junk was to be shipped to the Alaska Junk Company by straight bill of lading; none of the other parties to the action, however, had any knowledge of the contract.

During the last days of August and the first few days of September, 1918, the respondent Hines, operating the Northern Pacific Railway, received from Rosenblatt, at Phillipsburg, Montana, four cars loaded with scrap iron, for transportation to Seattle. Respondent Hines issued to Rosenblatt four separate bills of lading, one covering each car, each showing consignment to Rosenblatt at Seattle, notify Alaska Junk Company, and each showing the weight of the car, subject to correction. The fourth bill of lading figures in this case only indirectly. The railroad company did not have at the places of shipping these cars any facilities for weighing the cars and their weights were estimated. When the cars reached Missoula, however, on their way to Seattle, they were weighed and found to contain a less number of pounds than those designated in the bills of lading.

Thereafter, and on September 10, 1918, Rosenblatt drew a draft on the Alaska Junk Company in favor of the appellant for \$2,730, and attached thereto the four order bills of lading. This draft, with bills of lading attached, was delivered to the appellant at its banking

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house, and at the same time the appellant gave Rosenblatt's private account at the bank credit for the full amount of the draft. There was no agreement of any character between the parties concerning the draft and bills of lading other than such as would arise from the transaction as above outlined. Rosenblatt was a regular customer of the bank. In due course the appellant sent the draft, with bills of lading attached, to the Union National Bank at Seattle for the purpose of collection. The last named bank presented the draft, together with the attached bills of lading, to the respondent junk company, which refused to honor the draft or take up the bills of lading. They were then returned by the Seattle bank to the appellant at Salt Lake City. Shortly thereafter the junk company wired Rosenblatt to come to Seattle. When he arrived there the junk company took him to task about his conduct in drawing the draft and making the shipment by order bills of lading. It contended to him that the agreement was that the shipment was to be made direct to them because they had already paid him the purchase price of the shipment. They then procured Rosenblatt to make an order to the railroad company to release the three cars to the junk company (some other disposition, not shown by the record, having previously been made of the fourth car). Thereafter the cars were so released to the junk company without the bills of lading being surrendered. In order to get the cars the junk company was required to, and did, pay the freight thereon in the sum of \$560.06. The total weight of the three cars, according to the bills of lading, was 160,000 pounds; the actual weight, as determined by the railroad company at Missoula, was 138,100 pounds. The actual value of the three cars at Seattle was \$2,243.88. Prior to the bringing of this suit, the appellant had

been paid \$650 on account of the fourth car, which is not involved here, and which amount was credited to the draft, leaving unpaid thereon \$2,080. At the time the draft was drawn and delivered to the appellant, Rosenblatt had overdrawn his account at the bank in the sum of \$849.15. Prior to the time the bank received the draft for \$2,730, it had cashed another draft, (without bill of lading attached) drawn by Rosenblatt for \$1,000, and had credited his account at the bank with that sum, but on the date the draft in question here was drawn, the \$1,000 draft was returned uncollected, and the bank charged that amount, to wit, \$1,000, back to Rosenblatt's account. At the time the bank received notice that the draft involved here had been dishonored, Rosenblatt had to his credit in the bank \$12.40. It would seem that the trial court arrived at its judgment in the sum of \$868.45 in the following manner: It deducted from the face of the draft in suit, to wit, \$2,730, Rosenblatt's overdraft of \$849.15 and the amount of the dishonored \$1,000 draft, making a total of \$1,849.15, and added to this sum the \$12.40 still to Rosenblatt's credit, thus making a deduction of \$1,861.55 from the face of the draft, to wit, \$2,730, leaving \$868.45, for which amount judgment was given.

The elaborate briefs of the various parties have attacked the questions involved here from various angles. It is contended by the appellant that it was the purchaser and became the absolute owner of the draft and the bills of lading, and that, therefore, the respondent Hines has unlawfully appropriated its property and it is entitled to recover the full amount remaining unpaid on the draft. It further contends that the condition of Rosenblatt's private account with the appellant bank has nothing to do with the case. The respondent junk company contends that the appellant took the draft

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only for collection and that it did not become the owner thereof nor of the bills of lading, and that appellant actually advanced only \$868.45 in cash for or on the draft, the remainder of the amount going to discharge the Rosenblatt overdraft, and consequently appellant has been injured only in the sum of the difference between the amount of the draft and the amount which went to pay the overdraft, to wit, \$868.45, which is the amount of the judgment given by the trial court. The railroad company and the junk company contend that, in any event, judgment cannot be given appellant for a sum greater than the value of the scrap iron at Seattle, less the freight thereon. We do not find it necessary to follow the various arguments in detail. The case and the facts thereof very closely resemble, and are largely controlled by, the case of *Vickers v. Machinery Warehouse etc. Co.*, 111; Wash. 576, 191 Pac. 869. Had that case been decided at the time of the presentation of this case to us, doubtless the briefs and arguments of the various parties to the case would have been materially different. In that case we said:

“Much the greater number and weight of authorities is to the effect that, where one brings a check or draft to his bank, and such check or draft is made payable to the bank or is unrestrictedly indorsed to it, and requests that the amount thereof be put to his credit subject to his private check, and the bank complies therewith, and nothing else is said or done, it will be conclusively presumed that the bank has become the unqualified and absolute purchaser and owner of the check or draft, and consequently the absolute and unqualified owner of any proceeds to be derived therefrom. We think the theory is sound. It agrees with the idea and view generally accepted by business; it is the natural and unstrained construction of the action of the parties, and has the additional virtue of definitely fixing and at once defining the legal relationships of the parties in many check and draft transactions.”

The facts bring this case squarely within what was said in the *Vickers* case, and, under the rule of that case, it must here be held that the appellant became the absolute owner and purchaser of the draft given to it by Rosenblatt. Nor can the fact that the appellant charged back to Rosenblatt's account the amount of the dishonored \$1,000 draft, and reserved the right to charge back the draft involved in this action in the event it should not be paid, argue against the theory that appellant became the owner by purchase of the draft. We so expressly held in the *Vickers* case, *supra*.

We do not find it necessary to here decide whether the appellant became the owner of the bills of lading and the property they represented, or whether it held them and the property as collateral security for the payment of the draft which it had purchased. The result in this case must be the same whichever way we might decide that question. We will therefore assume, for the sake of argument, the position most favorable to the respondent, to wit, that the bank held the bills of lading and the property represented thereby as collateral security only. Under this theory it cannot be contended that any person other than the appellant had any right to these bills of lading until the amount it was entitled to receive was paid, and it cannot be argued that the respondent Hines did not wrongfully and unlawfully surrender to the junk company the property represented by the bills of lading, or that the latter did not receive the junk wrongfully, at least as to appellant.

The further question, therefore, is, What is the amount of appellant's injury because of such wrongful acts? Unquestionably it is the amount which the appellant would have been entitled to demand on the draft. We cannot agree with the trial court that such amount is the difference between the face of the draft and the

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amount of Rosenblatt's overdraft. The purchase of the draft in suit was a separate and independent act; it had nothing to do with, and no connection whatsoever with, any other business transactions between appellant and Rosenblatt. So far as the respondents are concerned, the appellant stood as the purchaser and absolute owner of the draft, and was entitled to collect the whole of the same before any person could get lawful possession of the bills of lading or the property which they represented. Rosenblatt had a right to pay what he owed the bank out of the money he received from the sale of the draft; and this is what was done when the bank charged back to Rosenblatt's private account the amount the latter owed it. The transaction is no different than if the bank had paid Rosenblatt the cash for the draft and the latter had then, out of such cash, paid the bank what he owed it on account of overdraft. To hold otherwise would be to deprive the bank of its rights as a purchaser and owner of the draft. From this it must follow that the appellant was entitled to receive the value at Seattle of the three cars of junk, up to the amount of its draft, to wit, \$2,080. The trial court found that the value of the scrap iron at Seattle, after the payment of the freight, was \$2,243.88. The testimony on the question of value is in a very unsatisfactory condition. We are unable to find anything to justify this finding of the court. Our conclusion is that the testimony shows that the value at Seattle of the material in question was the amount found by the court, without or before the payment of the freight. In other words, that the value after freight paid was \$1,684.44.

Both of the respondents contend that the most the appellant would be entitled to recover would be the value after deducting the freight, because, it is

argued, if the car loads of scrap iron had been turned back to it, it would have been required to pay the freight; that the amount of the freight money was a part of the value at Seattle. But it will be remembered that the appellant has sought recovery here only against respondent Hines, and that he had received his freight money before this suit was commenced, the same having been paid to him by the Alaska Junk Company when it wrongfully (at least as against the appellant and respondent Hines) obtained possession of the cars. It seems to us, therefore, to follow necessarily that the respondent Hines is in no position to contend that he should be liable only for the value less the freight. Indeed, if the junk company had paid the draft and become rightfully possessed of the bills of lading, and thereby had become rightfully entitled to the cars, it would have been required to pay the freight bill of the respondent Hines before it could have gotten possession of the material.

The respondent junk company contends that it has paid for the junk and was the owner of it, and therefore rightfully obtained possession of it. While this may be true as between it and Rosenblatt, it is not true as between it and the appellant. The latter did not know anything about the arrangements between the junk company and Rosenblatt. Rosenblatt had possession of the junk, the bills of lading were issued to him and he delivered them to the appellant. Our conclusion, therefore, is that the appellant is entitled to recover, up to the amount of its draft, the value at Seattle of the three car loads of scrap iron without deduction for freight. Such value is \$2,243.88, being an amount in excess of that found to be owing to appellant on its draft.

The judgment is reversed, and the cause remanded with directions to enter judgment in favor of the appel-

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lant and against respondent Hines in the full amount sued for, and also a judgment in favor of respondent Hines and against respondent junk company for a like amount.

HOLCOMB, C. J., FULLERTON, MOUNT, and TOLMAN, JJ., concur.

[No. 15795. Department Two. September 3, 1920.]

WILLIAM GRANT, *Respondent*, v. WILLIAM ROSENBURG
et al., *Appellants*.¹

NUISANCE (19)—OPERATION OF SLAUGHTER HOUSE—ABATEMENT—EVIDENCE—SUFFICIENCY. A nuisance in the operation of a slaughter house and fertilizing plant warranting its abatement is sufficiently shown where it appears that foul odors were emitted which spread over the adjoining property, causing discomfort and nausea to persons residing there, that it could not be operated without the emission of odors in some degree, and that its operation interfered with the comfort and health of the residents and greatly depreciated the value of all property in the vicinity by rendering it unfit for small suburban homes for which it is most suitable.

SAME (23)—OPERATION OF SLAUGHTER HOUSE—ABATEMENT. The fact that the business of conducting a slaughter house and fertilizing plant is a lawful one, and that it cannot be carried on without the emission of odors in some degree, thereby necessitating an abandonment of the business itself if abated as a nuisance, is not a valid objection, since the business may lawfully be conducted at any place where similar businesses are conducted, or upon property large enough to confine the objectionable odors thereto, and where not interfering with the use or enjoyment of other property or destroying its value; but such business may not be conducted at any or all places merely because it is lawful.

SAME (23)—INJUNCTION—RELIEF AWARDED—SUPPRESSION OF BUSINESS. Though a court of equity will not usually enjoin the operation of a legitimate business carried on at a proper place, because of the manner of its operation, but will first require the cause of the grievance to be corrected, it will abate the operation of a slaughter house and fertilizing plant located in a residential district where it must necessarily cause injury to adjoining property

¹Reported in 192 Pac. 889; 196 Pac. 626.

owners, it being impossible to operate such plant without the emission of odors therefrom.

HOLCOMB, C. J., dissents.

ON REHEARING.

NUISANCE (23)—SLAUGHTER HOUSE—REMEDIES—DECREE. Where the operation of a slaughter house and fertilizing plant has been enjoined as a nuisance, by reason of noxious odors arising therefrom, and evidence had been introduced to show that appliances could be obtained to eliminate these odors, which arose from the fertilizing plant and not from the slaughter house, it follows, that before an order might issue to destroy the plant, a reasonable time and opportunity should be given to obviate the noxious odors.

Appeal from a judgment of the superior court for King county, Davidson, J., entered October 11, 1919, upon findings in favor of the plaintiff, in an action for an injunction, tried to the court. Affirmed.

Ryan & Desmond, for appellants.

Shorett, McLaren & Shorett, for respondent.

FULLERTON, J.—The appellants, who were defendants below, together with one S. W. Ammer and one Ralph Broggi, own and conduct a slaughter-house and meat-packing plant, located in King county near the southern boundary of the city of Seattle at the place where the Des Moines highway crosses the same. Connected with the packing plant and as a part thereof, the appellants also conduct a fertilizing plant. In this plant parts of the slaughtered animals which would otherwise be waste are worked into a fertilizing product. The plant was started sometime in the year 1916. It had a small beginning, but was developed into a plant of considerable size and capacity by its originators, who sold to the appellants in the early part of the year 1919. After the appellants acquired the plant they greatly improved it, expending in betterments from ten to fifteen thousand dollars.

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The respondent owns a five-acre tract of land lying to the west of the appellants' plant, and some one thousand feet distant therefrom, on which he makes his home. He acquired the property eleven years prior to the trial, and has resided on it continuously since the construction of the appellants' plant. The tract is somewhat highly improved, and but for the presence of the appellants' plant has a value variously estimated to be between ten thousand and fifteen thousand dollars. The land surrounding the plant and the respondent's property was platted some years ago into five-acre tracts. The tracts lying to the south of the respondent's property are similar in character thereto and are desirable as residence property. Those lying to the north extend into the valley of the Duwamish river and are more suitable for gardening than dwelling purposes, and are occupied principally by Italian and Japanese market gardeners. The region is somewhat sparsely settled, although since the construction of the highway mentioned, in 1915, which made the land more accessible, demand for it for residence purposes has steadily increased. There is no plant similar in kind and character to that of the appellants in the vicinity.

In July, 1919, the respondent instituted the present action to abate the appellants' plant as a nuisance. He alleged in his complaint, and his evidence was to the effect, that the plant emitted intense and noxious odors, permeating and polluting the air in calm weather for a distance around the plant of one-half mile or more, and when the wind was blowing, for a much greater distance in the direction of the prevailing wind; that these odors had increased in intensity as the business of the plant increased, that they were present at all times, but were worse when the fertilizing plant was in operation, becoming at times so bad as to cause

nausea and vomiting. These conditions, it was further testified, had practically destroyed the respondent's property as residential property—indeed the wife of the respondent testified that they must abandon it as a place of residence, if no relief from the intolerable odors could be obtained—and had greatly depreciated its value. Other resident owners testified to like conditions with reference to their own property, and non-resident owners and agents of such owners testified to their inability to make sales of property because of the proximity of the plant and the odors emanating therefrom. The evidence of the respondent also tended to show that the plant itself was not equipped with the best modern appliances; that the fumes arising from cooking and drying the waste products of the slaughtered animals in the process of making the fertilizer was suffered to escape into the air, whereas it should be cared for in some other manner; that the septic tank, inserted for the purpose of cleaning and purifying the wash-waters used in and about the place where the animals are slaughtered and the cooling and cutting rooms, was either insufficient in size or improperly equipped, in that much animal matter escaped therefrom into a creek which flowed through the premises, where it attracted maggot-flies, dried on the banks, and caused an intolerable stench.

There was evidence from the other side to the effect that the respondent's witnesses had exaggerated the conditions; that, while the plant emitted odors, they were not of the repulsive and nauseating character described by the respondent and his witnesses—some of the witnesses testifying that they lived in even closer proximity to the plant than does the respondent, and that they suffered no ill effect or annoyance therefrom. Certain of appellants themselves testified that their

plant was modern, equipped with modern appliances, was kept clean and sanitary, and emitted no odors not usually emitted from plants of like kind where live stock is kept and slaughtered and the waste products therefrom were cooked and dried in the process of reducing it to a fertilizing agency. They denied that animal matter escaped from the plant into the creek, and sought to show that the district in which the plant was situated was more of a farming and gardening district than it was residential.

The trial court found the facts to be in accordance with the respondent's contentions; found that the plant was located in a residential district; that it could not be so operated as to do away with obnoxious and nauseating odors; that its operation interfered with the comfort and health of the neighboring residents, and greatly depreciated the value of all property in its vicinity. As matter of law, the court concluded that the respondent was entitled to a decree restraining and enjoining the appellants from operating the plant at its present location, or any other location in its vicinity; were entitled to a decree declaring the plant to be a nuisance, and to a decree abating it as such. A decree was entered in accordance with the findings and conclusions, and the present appeal is prosecuted therefrom.

The appellants first question the sufficiency of the evidence to justify the findings. But on this question there is hardly room for doubt. That there is emitted from the plant almost constantly foul and nauseous odors which spread over the adjoining property, causing at all times discomfort, and often-times nausea and vomiting, to the persons residing on such property, is abundantly proven. It is abundantly shown also that these conditions have greatly depreciated the value of

the surrounding property, because rendering it unfit for small suburban homes, the purposes for which it was most suitable.

But the appellants argue that the business in which they are engaged is lawful, that it cannot be carried on without the emission of odors in some degree, and that, if this is a sufficient reason for abating the business as a nuisance, the business itself must necessarily be abandoned. But the answer is not difficult. The appellants may lawfully conduct the business anywhere if they will acquire a sufficient area so that the odors arising therefrom will be confined to their own property; or they may conduct it at such places where businesses of like kind are usually carried on—where the conduct of the business is not to drive people from their homes, or to depreciate or destroy the values of their property. But businesses of this sort may not be conducted at any place or at all places merely because it is lawful. The appellants will not themselves contend that they can, without right or permit, invade physically their neighbors' property, and thus render it useless to such neighbors, and there can be no difference in effect between a physical invasion which destroys property and an invasion by a permeating substance which has a like effect.

There was evidence introduced in the record to the effect that appliances could be installed and improvements made in the plant which would greatly ameliorate the conditions of which complaint is made, though perhaps not doing away with the odor entirely. Based on this evidence, the appellants contend that the decree of the court is too sweeping and drastic; that the operation of the plant should not be suppressed entirely at this time, but that they should be permitted to install these appliances and make the improvements, and that

the operation of the plant should be suppressed only if the changes proved unavailing.

It is true that a court of equity will not usually enjoin the operation of a legitimate business carried on at a proper place, because of the manner of its operation, no matter how serious may be the grievance caused thereby. In the first instance, at least, it will require the cause of the grievance to be corrected, and will enjoin operation perpetually after it is proven that no application of science or skill can afford a remedy, or that the owners cannot be induced to conduct it properly. But there are certain businesses, of which slaughter-houses and fertilizing plants are examples, which from their very nature cannot be carried on except in more or less isolated places. No matter how scientifically the plants may be constructed or how hygienically they may be operated, they emit odors nauseating to the great body of mankind, and few people will reside or stay within the reach of these odors unless some overweening cause compels them so to do. For these reasons, courts will not permit their installation in residence districts, nor in districts where people are compelled to congregate in the pursuit of their ordinary avocations, nor on such a restricted area that their operation must of necessity render valueless to its owners abutting and adjacent property. *Sic utere tuo ut alienum non laedas*, is a maxim of the common law. Under the principle it announces, a proprietor cannot be permitted to convert his property into a nuisance to the detriment of other proprietors.

Within these principles, we cannot think the court erred in its decree. Nothing is shown or suggested which would so improve the plant as to prevent the annoying and noxious odors which must necessarily emanate therefrom from escaping onto the adjoining

property. This is an invasion of the property and something to which the owners ought not to be compelled to submit, whatever use they may make or desire to make of their property. But we agree with the trial court that this is a district suitable primarily for residential purposes, that property therein has its chief value because it is so, and that its growth is being retarded because of the location and operation of the appellants' plant. In other words, the plant is located at a place where it must necessarily cause injury to the adjoining property owners, and that it is thus a nuisance which they are entitled to have abated.

The decree is affirmed.

MOUNT, TOLMAN, and BRIDGES, JJ., concur.

HOLCOMB, C. J. (dissenting).—In my opinion, the decree should merely be modified so as to require the appellants to abate the nuisance by installing such apparatus and appliances as will destroy the noisome matter. Injunction to repress a lawful business is the harshest remedy available and should be used discreetly and sparingly, and a nuisance abated, when possible, without restraining the business.

I therefore dissent from the result reached herein.

ON REHEARING.

[*En Banc*. March 24, 1921.]

MOUNT, J.—After the departmental decision was filed in this case, a petition for a rehearing *En Banc* was granted and the case was reargued. The judgment appealed from restrained the appellants from conducting or operating their slaughter house and fertilizing plant and abating the plant as a nuisance by reason of noxious odors arising therefrom. A majority of the court upon this rehearing are of the opinion that the order appealed from goes farther than neces-

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sary and that the trial court should have given the appellants an opportunity to avoid the noxious odors, as was done in the case of *Wilcox v. Henry*, 35 Wash. 591, 77 Pac. 1055.

Upon the trial of the case, Dr. Sparling, the county health officer for King county, was called as a witness for the respondent. After testifying that the odor surrounding the place came from the rendering fats of the fertilizing plant, then in answer to the question, "Do you know of any way whereby that could be eliminated?" answered as follows:

"Well, there are two methods that are used to eliminate this smell, and one of them is by having the odor, when it is dumped, pass through condensers, condensers which are made for this purpose, and in that way the odor is condensed there and liquified and passes off with the other drainage, and any fat that is left in there, in the condenser, is taken out of the condenser and sold. Another way is by a tall, superheated flue. After the odor passes up this flue it passes into a jet of burning oil, and in this way the odor, which is more or less gases, are all carbonized and practically all the odor is eliminated. Q. Are there appliances of that kind manufactured, doctor, do you know, especially for this purpose? A. Yes."

So it is apparent that there is evidence in the record tending to show that the noxious odors may be eliminated. It follows that, before an order may issue destroying the plant of appellants, a reasonable time and opportunity should be given to the appellants to obviate the noxious odors.

A majority of the court is further of the opinion that the complaint, as well as the evidence, shows that the odors arose from the fertilizing plant and not from the slaughter house, and that the plant is not located in a residence section but is in a suburban district where the nearest dwelling is three hundred yards

away and the land surrounding is platted into five acre garden tracts.

For these reasons, the judgment appealed from is reversed and the cause remanded with directions to the lower court to grant the appellants ninety days time within which to avoid the noxious odor, the appellants to recover their costs of this appeal.

PARKER, C. J., MAIN, HOLCOMB, TOLMAN, MACKINTOSH, BRIDGES, and MITCHELL, JJ., concur.

[No. 15827. Department Two. September 3, 1920.]

C. F. SEAL *et al.*, as *Sequim Trading Company*,
Appellants, v. J. R. LONG *et al.*, *Respondents*.¹

ACCOUNT, ACTION ON (3)—NOVATION (7)—EVIDENCE—ADMISSIBILITY. In an action on an account in which defendants claimed a novation agreement whereby purchasers of their sawmill assumed the account and they were thereby released, evidence as to delivery of the merchandise comprising the account and whether items of credit thereon were for lumber delivered by the purchaser of the mill was admissible on the question of whether there had been a novation.

APPEAL (401)—REVIEW—DISCRETION—ORDER OF PROOF. Permitting improper cross-examination of a witness by defendants which in effect made him their own witness was but allowing the introduction of evidence out of its natural order and within the discretion of the trial judge, to be reviewed only for abuse of discretion.

FRAUDS. STATUTE OF (7-1) — AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR—NOVATION. An agreement of novation is not void under the statute of frauds for the reason that the plaintiffs agreed at that time to allow the purchaser of a mill to satisfy the assumed account by payments extending over a period of one year, where the agreement of novation was complete and separable and a consideration for the transfer of the property at the time it was made, and unaffected by the agreement as to the time of payment of the assumed account, which was wholly between the plaintiffs and the purchasers of the mill.

¹Reported in 192 Pac. 896.

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NOVATION (7)—EVIDENCE—ADMISSIBILITY. In an action on an account in which defendants claimed a novation agreement whereby purchasers of their mill assumed the account and they were released, the written bill of sale given by defendants to the purchasers is the best evidence of the transfer of the property and was admissible for that purpose, and not objectionable as failing to show release of the original debtors, or to sustain the defense of novation, or as not conforming to the novation agreement as alleged in defendants' answer.

APPEAL (413)—REVIEW—VERDICT. Findings of the jury on conflicting evidence will not be disturbed on appeal.

EVIDENCE (127)—DOCUMENTARY EVIDENCE—ACCOUNT BOOKS—SELF-SERVING DECLARATIONS. In an action on an account in which defendants claimed a novation agreement whereby purchasers of their mill assumed the account and they were released, it was not error to refuse to admit plaintiff's account books in evidence to show that no transfer of the assumed account had been entered therein, since the same would amount to the admission of self-serving declarations, and not as declarations against interest.

TRIAL (101)—INSTRUCTIONS—REQUESTS. It is not error to refuse requested instructions which, so far as material, were embodied in the instructions given.

NEW TRIAL (10)—GROUNDS—MISCONDUCT OF PARTIES—EXAMINATION OF WITNESSES. In an action on an account in which defendants claimed a novation agreement whereby purchasers of their mill assumed the account and they were released, and in which some question was raised as to the manner in which defendants had become possessed of the bill of sale, the natural inference being that it never had been delivered to the purchasers, it was not error to refuse plaintiffs' motion for new trial on the ground of prejudice in allowing a witness to refer to a mortgage foreclosure by plaintiffs against defendants concerning the property described in the bill of sale; since the evidence was a part of the proofs in explanation of defendants' possession of the bill of sale, and no prejudice resulted to plaintiffs.

Appeal from a judgment of the superior court for Clallam county, Hall, J., entered December 11, 1919, upon the verdict of a jury rendered in favor of the defendants, in an action on contract. Affirmed.

A. W. Buddress, for appellants.

T. F. Trumbull, for respondents.

FULLERTON, J.—The appellants, C. F. Seal and wife, dealers in general merchandise, Clallam county, brought this action against the respondents, J. R. Long and wife, to recover the sum of \$1,557.78, alleged to be a balance due for merchandise sold and delivered by them to the respondents between May 1, 1916, and October 31, 1917. The account was itemized in the complaint and showed in detail the debits and credits. The respondents, on answering the complaint, admitted that the merchandise therein alleged and set forth was sold and delivered to them and that, subject to errors in computation, the prices charged and the credits given were correct, but denied that the sum claimed was due from them to the appellants, or that any greater sum was due on the account than \$57.78. For a further and separate answer, they set up the following:

“That on or about the 18th day of January, 1917, these defendants were indebted to the plaintiffs upon the account set forth in the complaint herein in approximately the sum of \$1,583.79. That on and prior to said dates these defendants were the owners of a sawmill plant located and being operated on the farm of C. W. Lawrence, near Sequim. That on said 18th day of January, 1917, the defendants were about to sell said sawmill plant to Liem & Berry, a copartnership, for the sum of \$3,000, and said plaintiffs insisted that in consummating said sale the amount owing from these defendants to plaintiffs should be provided for. That at said time and in accord with the demands of the plaintiffs, and in order to bring about a settlement and adjustment of the account of the plaintiffs against the defendant, the defendant offered and agreed to and with plaintiffs that, if plaintiffs would release and discharge defendants from all further liability upon said account, he would cause said Liem & Berry to assume and agree to pay to plaintiffs the sum of \$1,500, said assumption and agreement of said Liem & Berry

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to be part of the consideration for the sale of said saw-mill plant. That said plaintiffs agreed to and accepted said offer of settlement, and in accordance therewith said Liem & Berry assumed and agreed to pay the said plaintiffs said sum of \$1,500, and plaintiffs released and discharged defendants from all further liability by reason of said account, and since said time has looked to said Liem & Berry for the payment of said \$1,500 and has accepted payments from them."

The appellants replied to the new matter in the answer, denying generally the allegations thereof.

The issues of fact raised by the pleadings were tried by the court sitting with a jury, and resulted in a verdict for the appellants for the sum admitted by the respondents to be due, and from the judgment entered thereon, this appeal is prosecuted. The assignments of error will be noticed in the order in which the appellants present them.

In their case in chief the appellants called as a witness the appellant C. F. Seal, and inquired of him whether the appellants had any other account against the respondents than the account set forth in the complaint, and whether that account had been paid, to all of which he answered in the negative. On cross-examination the witness was asked, and, over the objection of the appellants to the effect that the account was admitted and the matter inquired of outside of the issues, was permitted to answer that the merchandise comprising the items of the account sold prior to the sale of the mill was delivered at the mill, and that the items delivered subsequent to the sale of the mill were delivered at the respondents' home. He was further asked whether the sum of the items of credit appearing on the account were not credits for lumber delivered to him by the purchasers of the mill. This was objected to for the reasons first assigned, and the objections

being overruled, the witness answered in the negative. Later on in the trial, while the respondent J. R. Long was testifying on behalf of the respondents, he was asked and permitted, over the appellants' objection, to answer concerning these credits to the effect that he had delivered no lumber or invoices for lumber to the appellants which could give rise to them. Concerning this testimony, the appellants' counsel say:

"It will, therefore, be observed that the court permitted defendants, first, on the cross-examination of the plaintiff Seal, and next on the direct examination of the defendant J. R. Long, as well as on that of his son, to go fully into this account for the purpose of discrediting the plaintiff C. F. Seal, and to impeach him by showing that he had given 'false' 'lumber' and 'labor' credits to Long, on this account, after Long had sold out, instead of giving these credits to the purchasers, Liem and Berry, and that Seal did this for the purpose of bolstering up his case by an attempt to 'refasten' this transferred account back onto Long. That these rulings were highly prejudicial to plaintiffs, requires no argument."

But we cannot think counsel's criticism just. Since the question whether there had been a novation was the principal matter at issue, the respondents had the right to introduce any relevant evidence tending to elucidate the issue, and clearly evidence tending to show that the appellants had received payments from the purchasers of the mill and credited the payments on the account incurred by the respondent was relevant to that issue. Its probative force may not have been strong on the question of release, as the appellants undoubtedly could have accepted the purchasers of the mill as the principal obligators without releasing the respondents, but here there was a denial of any assumption on the part of the purchasers and the evidence plainly bore upon that question. To inquire of

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the witness Seal concerning the matter was not, of course, proper as cross-examination, and the respondents, in effect, made him their own witness. But this was but to introduce evidence out of its natural order, and was so far within the discretion of the trial judge as to be reviewed only for an abuse of discretion. We cannot see how in any manner the appellants could have been prejudiced by it, and cannot, therefore, find such an abuse as to require a new trial.

The second assignment is that the evidence is insufficient to show a novation. The respondents' evidence was to the effect that, at the time the agreement of novation was made, the appellants agreed with the purchasers of the mill that they could satisfy the assumed account by monthly payments of fifty dollars in cash and by delivering monthly to the appellants lumber to the value of fifty dollars. This, it will be observed, extends the time of payment over a period of one year, and it is argued that the agreement of novation is void under the statute of frauds because not in writing and not to be performed within a year. But the agreement of novation and the agreement as to the time of payment of the assumed account were separable, or, perhaps better, entirely unconnected. The agreement of novation was complete, in so far as the respondents were concerned, when the agreement was entered into, and they transferred the mill property in consideration thereof. The agreement as to the time of payment of the assumed account was wholly between the purchasers and the appellants, and the fact that this agreement may have been invalid as between them could not affect the principal contract, which was fully executed.

The third assignment is that the court erred in admitting in evidence the written bill of sale given by the respondents to the purchasers. It is argued that

it was inadmissible, first, because it does not purport to and does not relieve the original debtors from their obligation; second, that it is not sufficient to sustain the defense of novation because made without knowledge or consent of the appellants; and third, because it does not conform to the original agreement of novation set forth in the answer of the respondents. But we cannot think either of these objections tenable. The purpose of its introduction was to show the transfer of the mill property to the purchasers. Of this fact it was the best evidence, and since the fact was one competent to be shown, it was clearly admissible for that purpose. Had the respondents' case rested entirely upon the bill of sale, doubtless it would have been faulty for the reasons suggested. But this was not the fact. Their case was substantiated by evidence of which this was only one link in the chain of proofs.

In this connection it is also argued that the evidence is insufficient to show a release of the obligation on the part of the appellants, or an agreement to assume it on the part of the purchaser of the mill. But on these questions there was clearly a conflict in the evidence, and since the jury found for the respondents, we have no warrant to interfere.

The fourth assignment is that the court erred in refusing to admit in evidence the account books of the appellant showing the items of account between the appellants and the purchasers of the mill entered subsequent to the purchase; the purpose being to show that neither the account alleged to have been assumed, nor the items for lumber claimed by the respondents to have been delivered to the appellants by the purchasers of the mill, were entered therein. But this was not error. It is true, as the appellants argue, that had the appellants transferred the account in dispute on

his account books from the respondents to the purchasers of the mill, the respondents could have shown the fact as supporting their contention that there had been a novation, but the converse of the rule, as they further argue, does not follow. The respondents' right to show the fact rests on the principle which permits admissions and declarations against interest made by the adverse party to be shown, but the rule does not permit a party to show his prior declarations, self-serving in their nature, as evidence in his favor. There are, of course, well defined exceptions to the rule, but these need not be noticed, as they are without application to the evidence here offered. But we cannot regard the question as being very material in any event. The evidence, taken as a whole, shows that the appellants made no transfer of the account on their books, and it could hardly have been made more conclusive had the rejected evidence been admitted.

The fifth assignment of error involves questions heretofore discussed and requires no further notice. The sixth assignment relates to the refusal of the court to give certain requested instructions. These require no special consideration. In so far as they were material they were embodied in the instruction given, and this satisfies the rule.

The appellant filed a motion for a new trial, which the trial court overruled. The motion was supported by the affidavit of the appellant C. F. Seal in which he swears:

"That defendants for the purpose of misleading and prejudicing the jury against plaintiffs, wrongfully and wilfully had defendants' witness, Andrew Severyns, refer to a chattel mortgage foreclosure proceedings by this affiant against defendants, covering all of said property described in said bill of sale, from J. R. Long

to Liem and Berry, whereby this affiant obtained all of said property.”

The evidence on which this charge is based is the following:

“Q. I show you Exhibit 1. Did you ever see that before? A. Yes, sir. Q. Did you ever have it in your possession? A. Yes, I have had this in my possession for I guess over two years. Q. Where did you get it? A. Why, Liem, and I believe a man by the name of Drake, gave it to me. Q. It came into your possession as attorney for Liem & Berry? Mr. Buddress: Objected to as leading. Q. All right. How did it come into your possession? A. Why, I believe there was a mortgage foreclosure suit on at that time between Mr. Seal and Mr. Liem on the saw mill. Mr. Buddress: I object to that. It is immaterial and outside of the issues of this case. The Court: Objection sustained. He may tell who delivered it to him. A. Why, Mr. Liem and a man by the name of Drake delivered it to me.”

The witness interrogated was the witness Severyns referred to in the affidavit. The exhibit shown the witness was the bill of sale from the respondents to the purchaser of the mill. Theretofore in the course of the trial some question had been made as to the manner in which the respondent had come into possession of the bill of sale—the inference naturally arising from the facts shown being that the bill of sale had never been delivered. This evidence was a part of the proofs in explanation of the fact. Seemingly no comment is required. Plainly there was no substantial ground for the charge made, and no error requiring reversal.

The judgment is affirmed.

HOLCOMB, C. J., MOUNT, TOLMAN, and BRIDGES, JJ., concur.

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Opinion Per MAIN, J.

[No. 15823. Department One. September 3, 1920.]

In the Matter of the Estate of GEORGE ADIN.
LUCY SELLERS et al., Respondents, v. ANNA EVELYN
ROOT et al., Appellants, SEVERENE OLSON
*et al., Defendants.*¹

WILLS (20)—VALIDITY—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY. There is no showing that a bequest to an attorney who drafted a will was induced by undue influence, where, after writing a letter in which the testator expressed a desire to give most of his property to the attorney, he was advised not to do so, but to think the matter over, and if he then desired to make a bequest, a smaller amount would be acceptable; that the will was later drafted by the attorney and contained a bequest to him in smaller amount than indicated in the letter, after which it was read and explained to the testator, who stated that it was correct.

SAME (38)—CONTESTS—BURDEN OF PROOF. Upon the contest of a will which has been admitted to probate, the burden of proof is upon the contestants to establish every material fact alleged.

SAME (17)—VALIDITY—DRAFTING OF WILL BY BENEFICIARY. The drafting of a will by a beneficiary thereunder does not in itself defeat the bequest, where there is no showing of undue influence and the evidence is clear and unequivocal that the will as written was as the testator desired it.

Appeal from a judgment of the superior court for Skagit county, Hardin, J., entered September 17, 1919, upon findings in favor of the plaintiffs, as against one defendant, in a will contest, tried to the court. Reversed.

Robert A. Devers, R. V. Welts, Coleman & Gable,
and *Edward Judd*, for appellants.

MAIN, J.—This is a will contest, the grounds of which are the alleged incapacity of the testator and undue influence in procuring the making of the will. After the issues were framed, the cause was tried to

¹Reported in 192 Pac. 887.

the court without a jury, and resulted in a judgment denying the charge of mental incapacity and overruling the charge of undue influence, except as to one bequest, which was to the attorney who drew the will. The appeal is from that part of the judgment which set aside the bequest of the attorney on the ground of undue influence. The facts essential to be stated are these:

George Adin, now deceased, was for many years prior to his death a resident of Skagit county. Milo A. Root, now deceased, was practicing law in Seattle, Washington, and for sometime prior to January 3, 1915, had been the attorney for Adin. The will in controversy was duly executed on January 3, 1915. The testator, George Adin, died in September, 1916. The will was admitted to probate by the superior court of Skagit county, October 2, 1916, and letters testamentary were issued to Milo A. Root. On January 9, 1917, Milo Root died, leaving the administration of the estate uncompleted. Subsequently administrators with the will annexed were appointed. On September 29, 1917, the contestants of the will filed their petition to vacate the order admitting it to probate, upon the grounds, as above stated, of mental incapacity and undue influence. As to the bequest of the attorney who drew the will, the trial court held "that a legal presumption of undue influence arises and exists as to the bequest made to Milo A. Root under and in said will, which presumption has not been overcome." The only question in the case is whether the bequest to Milo A. Root was induced by undue influence.

There is no evidence sustaining the charge of undue influence. All the evidence in the record on the question is to the effect that there was no undue influence. Prior to the drafting and execution of the will in con-

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troversy, Adin, the testator, wrote Root a letter in which, among other things, he said: "I want to change my will and give most of my property to you." This letter is in evidence and its verity is not questioned. The evidence shows that, shortly after writing the letter, Adin came to Root's office and the latter advised him that he did not wish to accept a large bequest and suggested that Adin go home and think the matter over, and if, after deliberating upon it, he still wished to make a bequest, one in a lesser amount would be acceptable. Later, Adin again came to Root's office and the will in controversy was drafted by the latter. It contains a bequest to him, but not in the amount indicated in the letter referred to. After the will was drawn, the circumstances under which it was prepared were recited to the three persons who were to witness it. Adin, after listening to the recital, stated that it was correct. Thereupon the will was read to Adin, paragraph by paragraph, and Root's connection with it and his rights and benefits under it explained, and Adin announced that it was as he wished it. The will was then executed in proper form. The facts just recited are testified to by three creditable and disinterested witnesses. As already stated, there is no evidence in the record which shows or tends to show the exercise of undue influence. Even though the burden were upon the beneficiary of the bequest to show that no undue influence had been exercised, the evidence in this case would fully meet and overcome such burden. The rule, however, is the other way. In *Hunt v. Phillips*, 34 Wash. 362, 75 Pac. 970, it was held that, on the contest of a will which had been admitted to probate *ex parte*, the burden of proof was upon the contestants to establish every material fact alleged. Substantially the same rule has been embodied in the

probate code (Laws of 1917, ch. 156, § 17, p. 647), which reads as follows:

“In any such contest proceedings [will contests] the previous order of the court probating, or refusing to probate, such will shall be *prima facie* evidence of the legality of such will, if probated, or its illegality, if rejected, and the burden of proving the illegality of such will, if probated, or the legality of such will, if rejected by the court, shall rest upon the person contesting such probation or rejection of the will.”

The facts and the presumption both sustain the will as written. While it may have been an error of judgment for a beneficiary under the will to act as the draftsman thereof, this in itself is not sufficient to defeat a bequest where there is no evidence showing undue influence, and where the evidence upon the question, given by creditable witnesses, is clear and unequivocal in support of the view that the will as written was as the testator desired it.

The judgment will be reversed, and the cause remanded with directions to the superior court to enter a judgment sustaining the will in its entirety.

HOLCOMB, C. J., TOLMAN, BRIDGES, and PARKER, JJ.,
concur.

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Syllabus.

[No. 15814. Department One. September 8, 1920.]

NELLIE CARLISLE, *Respondent*, v. GEORGE E. HARGREAVES
et al., *Appellants*.¹

MUNICIPAL CORPORATIONS (380, 384, 390)—USE OF STREETS—COLLISION AT CROSSING—FAILURE TO SOUND HORN—PROXIMATE CAUSE—QUESTION FOR JURY. In an action by a passenger in an automobile in collision with defendant's automobile at a street intersection, although the failure of defendant to sound his horn would not have prevented the collision in view of the knowledge of plaintiff's driver of the approach of defendant's car, yet it was for the jury to say whether or not such failure of defendant to sound his horn was the proximate or contributing cause of plaintiff's injury, where plaintiff did not see or know of the approach of defendant until the instant of the collision; since the court cannot say, as a matter of law, that a timely warning might not have enabled plaintiff to prevent, or at least lessened, her injury.

TRIAL (121)—MISCONDUCT OF JURY—QUOTIENT VERDICT. A new trial will not be granted for misconduct of the jury in taking a quotient verdict, where the affidavits show that they did determine by that process what the average of the amounts each juror voted to award plaintiff would be, but that the ultimate amount awarded was not made in compliance with any previous agreement entered into between them upon their consideration of the case.

SAME (118)—MISCONDUCT OF JUROR—COMMUNICATING WITH WITNESS. The conduct of a juror in questioning a witness as to defendant's nationality, and stating that another member of the jury thought she was German, during a recess of the court, while censurable, is not ground for a new trial in that it showed prejudice against the defendants, since it was probably prompted by no other motive than curiosity.

DAMAGES (80)—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$1,000 for injuries sustained in an automobile collision, though excessive if measured by plaintiff's money loss incurred for medical attendance and for her loss of wages, will not be held excessive in view of severe injuries sustained, and pain and suffering for several weeks, precluding the court from saying, as a matter of law, that the award is excessive or prompted by prejudice or passion on the part of the jury.

¹Reported in 192 Pac. 894.

Appeal from a judgment of the superior court for King county, Hall, J., entered October 18, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in an automobile collision. Affirmed.

William U. Park and Paul S. Dubuar, for appellants.

Clem J. Whittemore and H. M. Ramey, Jr., for respondent.

PARKER, J.—The plaintiff, Miss Carlisle, seeks recovery of damages which she claims to have suffered as the result of the negligent driving of an automobile by the defendant Mr. Hargreaves, in Seattle, which automobile was at the time owned by the community consisting of Mr. Hargreaves and his wife, and was then being driven by him for the community. Trial in the superior court for King county resulted in a verdict and judgment awarding to the plaintiff recovery in the sum of \$1,000 against the defendants, from which they have appealed to this court.

Just prior to the time respondent, Miss Carlisle, was injured, she was riding in the rear seat of an automobile, between two gentlemen friends, as a guest of her brother-in-law, Mr. Yapple, who was driving the automobile, his wife sitting in the front seat with him. They were proceeding northerly along Fourth avenue, approaching Virginia street, which crosses Fourth avenue at right angles. At the same time, appellants were approaching Fourth avenue in their automobile, from the east, along Virginia street. The two automobiles came into collision within the street intersection, resulting in Yapple's automobile, in which respondent was riding, being thrown violently against the curb and an electric light post, at the northwest corner of the street intersection, though the automobile was not upset, evi-

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dently because of its being thrown against the post. Miss Carlisle was severely injured. The evidence seems to render it plain that Hargreaves did not sound his horn as he approached the street intersection, or at any time prior to the collision, though the impending danger of a collision must have been apparent to him in time for him to have sounded his horn after realizing such impending danger. Yaple saw Hargreaves' automobile approaching and was as fully and timely apprised of the impending danger as he would have been had Hargreaves given timely warning by sounding his horn. Respondent, however, did not see nor become conscious of the approach or presence of appellant's automobile until the instant of the collision. An ordinance of the city, the force and validity of which is not questioned, reads in part as follows:

"No . . . driver of a motor vehicle . . . shall fail to sound his signal device as a warning when there is danger of collision or accident by reason of the approach of such . . . vehicle . . ." Seattle Ordinance, No. 37,434, § 11.

Among other grounds of negligence relied upon at the trial by counsel for respondent was the failure of Hargreaves to sound his horn as a warning of the approach of his automobile. Counsel for appellants requested the trial court to withdraw this alleged negligence from the consideration of the jury. This the court did not do, but submitted it to the jury by appropriate instructions with other alleged negligence. In so ruling it is insisted that the court erred to the prejudice of appellants, because, since Yaple saw the approach of appellants' automobile, he was concededly as fully and timely advised thereof and of the impending danger as he would have been had Hargreaves sounded his horn.

Counsel invoke the law as announced in our decisions in *Van Dyke v. Johnson*, 82 Wash. 377, 144 Pac. 540; *Camozzi v. Puget Sound Tr. L. & P. Co.*, 94 Wash. 545, 162 Pac. 987, and *Blanchard v. Puget Sound Tr. L. & P. Co.*, 105 Wash. 226, 177 Pac. 822, which is, in substance, that when one sees an approaching car or vehicle and is injured thereby, under such circumstances as to timely furnish him all the information which he could have acquired from the sounding of a signal as required by law, the failure to sound such signal cannot be the proximate cause of the injury, and is therefore not negligence which can be considered as lending any support to the injured person's claim for damages. Had Yaple, the driver of the automobile in which respondent was riding, been the one who was injured by the collision, it would seem plain that the failure of Hargreaves to sound his horn would not have been the proximate cause of such injury; but we think that is not the test as to whether or not Hargreaves' failure to sound his horn was the proximate cause of respondent being injured; since she did not see nor become conscious of the approach of appellant's automobile until the instant of the collision. It seems to us that the ordinance requirement of the sounding of a signal in a situation like this is for the benefit of all persons who may be threatened with injury, and to give all such persons warning to the end that they may so act, looking to their safety, as opportunity may afford. We are not able to say, as a matter of law, in the light of the evidence here disclosed, that a timely warning from appellant's automobile might not have enabled respondent to do some act looking to her safety that would have prevented, or materially lessened, her injury. She was manifestly deprived of any such opportunity by the fact, as may have been found by the jury,

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of Hargreaves' failing to sound his horn. The fact that the sounding of a signal from appellant's automobile would not have prevented the collision, in view of the knowledge Yaple had of the approach of appellant's automobile, does not, we think, make it so plain that we can say, as a matter of law, that respondent could not have prevented, or at least materially lessened, her injury, had she been timely warned of the approaching collision by the giving of a signal as prescribed by the ordinance. We think it was for the jury to say whether or not the failure of Hargreaves to sound his horn materially contributed to respondent being injured.

It is contended that there was misconduct of the jury, in that they arrived at their verdict as to the amount of damages awarded respondent by taking and adopting, in compliance with a previous agreement made between them, a quotient obtained by taking the average of the amount that each juror first voted respondent was entitled to. The affidavits presented touching this question, upon the hearing of the motion for a new trial, do seem to show that the jurors did determine by this process what the average of the amounts each juror voted to award respondent would be; but we think the preponderance of the evidence, presented to the court in the form of the affidavits, shows that the ultimate amount of \$1,000 awarded was not made in compliance with any previous agreement between the jurors entered into upon their consideration of the case. Indeed, a reading of all of the affidavits causes us to very much doubt that \$1,000 was the exact quotient arrived at in the determination of the average of the awards voted by each juror. In *Wiles v. Northern Pac. R. Co.*, 66 Wash. 337, 119 Pac. 810, Judge Ellis, speaking for this court, observed:

“There was no statement that the jurors had agreed in advance to abide by the result. Such an agreement is the very essence of the misconduct charged. The burden of showing all the essential elements of the misconduct charged was upon the appellant. This court has often held that the taking of a quotient is not in itself misconduct, unless it appears that the jury had agreed in advance to be bound by it; even though the verdict returned be exactly or nearly the amount of the quotient. *Stanley v. Stanley*, 32 Wash. 489, 73 Pac. 596; *Conover v. Neher-Ross Co.*, 38 Wash. 172, 80 Pac. 281, 107 Am. St. 841; *Bell v. Butler*, 34 Wash. 131, 75 Pac. 130; *Watson v. Reed*, 15 Wash. 440, 46 Pac. 647, 55 Am. St. 899.”

We think our decision in *United Iron Works v. Wagner*, 98 Wash. 453, 167 Pac. 1107, relied upon by counsel for appellants, is not in point here. In that case there was an agreement entered into between the jurors to determine the amount of their award by the quotient process, and the award was so made without further consideration. We think there was no misconduct of the jury in this case in this respect calling for a new trial. Some contention is made that the trial court erred in extending the time for receiving affidavits in resistance of the motion for a new trial upon this ground. We are quite convinced, however, that there was no abuse of discretion on the part of the court in this particular.

It is contended that there was misconduct of one of the jurors in talking about the case to Mrs. Lutz, who was a witness in the case, during a recess of the court while the case was on trial. Adopting appellants' counsel's version of the affidavit showing this incident, it is as follows:

“This affidavit sets forth that Mrs. Lutz had testified in the case, and that later in the same day she was standing in the corridor of the court house when she

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was approached by one of the jurors in the case, who questioned her with regard to appellant Marceline D. Hargreaves, who had also testified in the case. The juror asked Mrs. Lutz, 'What nationality is that lady?' Mrs. Lutz asked her, 'What lady?', to which the juror replied, 'I am one of the jury on that case you were on this morning.' Mrs. Lutz then said, 'Oh, you mean Mrs. Hargreaves?' The juror having answered in the affirmative, Mrs. Lutz said, 'She's French.' The juror then stated that she thought Mrs. Hargreaves was French, but that there had been some discussion by the jury about the matter and that one of the other ladies on the jury thought Mrs. Hargreaves was German."

It is first argued that, since hostilities of the late war had just ceased at the time of the trial and there was a strong anti-German feeling in this country, the conversation showed prejudice on the part of the juror against the appellants, because of the juror's apparent impression that Mrs. Hargreaves was a German, and that the juror was seeking to confirm her impression in that respect. This argument manifestly would not avail appellants, because the information which the juror there received, that is, that Mrs. Hargreaves was French, would seem to be plainly to appellants' advantage, rather than the contrary, should we assume that the question of Mrs. Hargreaves' nationality could be considered as having any influence on the juror at all. On the other hand, it is argued that the fact that the juror discovered that Mrs. Hargreaves was French might have caused the juror to be prejudiced against her upon the general ground of her foreign nationality. Neither of these arguments, we think, under the circumstances, merits serious consideration. It is hard to escape the conclusion that the juror's question was prompted by other than mere curiosity as to Mrs. Hargreaves' nationality. While we think that the act of

the juror was in a measure censurable, it is not such as to call for a new trial.

It is strenuously contended that the award of the jury was excessive in amount. If we were to measure the award by the actual money loss suffered by respondent in her expense incurred for medical attendance, and in her loss of wages, it would be easy to say that the award was excessive; but since she was severely injured, and experienced pain and suffering for a period of several weeks, we cannot say, as a matter of law, that the total award of \$1,000 was excessive, or that its measuring was prompted by prejudice or passion on the part of the jury.

The judgment is affirmed.

HOLCOMB, C. J., and MITCHELL, J., concur.

[No. 15803. Department One. September 8, 1920.]

DYER BROTHERS GOLDEN WEST IRON WORKS, *Plaintiff*, v.
HANS PEDERSON *et al.*, *Defendants*.¹

MUNICIPAL CORPORATIONS (163)—IMPROVEMENTS—CONTRACTS—SUB-
LETTING—VIOLATION OF CHARTER—RIGHTS AND LIABILITIES OF PARTIES.
A subcontract for part of the work of constructing a bridge, entered
into in violation of a charter provision "that no contract shall be
sublet except for the furnishing of material, without the previous
consent of the city council," is voidable at the election of either
party thereto prior to consent by the city council; and when so
avoided by breach thereof and notice of abandonment of the work
by the subcontractor, all claimed rights of the parties thereunder
as then or thereafter accruing, as in case full performance had been
made, ceased to exist and it could no longer be the basis of an ac-
tion for its breach.

SAME (181) — CONTRACT — BREACH — RIGHTS OF PARTIES UNDER
VOIDABLE CONTRACT. Although such contract was voidable at the
election of either party thereto prior to consent by the city council,
and was unenforceable as an executed contract, nevertheless, it not

¹Reported in 192 Pac. 1002; 197 Pac. 622.

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being immoral or void for want of consideration, there was created an enforceable legal obligation in favor of the subcontractor for services rendered thereunder up until the time of his abandonment of the work, the value of which will be measured by the terms of the contract; and it appearing that the subcontract was half completed at the time of its abandonment and that the contractor had paid thereon more than half the total contract price, such payment constituted a complete satisfaction of the obligation arising in favor of the subcontractor and he could recover nothing more under the contract.

ON REHEARING.

SAME (154, 181)—IMPROVEMENTS — CONTRACTS — VALIDITY — SUB-LETTING — VIOLATION OF CHARTER — BREACH OF CONTRACT — RIGHTS AND LIABILITIES OF PARTIES. A charter provision against the subletting of a city contract without the consent of the city is for the sole benefit of the city and does not invalidate a subcontract as between the parties to it, until the principal contract is terminated by the city for want of consent (PARKER, C. J., and HOLCOMB, J., dissenting).

Appeals from a judgment of the superior court for King county, Ronald, J., entered December 4, 1919, in an action to foreclose a mechanics' lien, tried to the court. Affirmed.

Corwin S. Shank and *H. C. Belt*, for appellant Erickson Construction Company.

Roberts & Skeel, for appellants Pederson *et al.*

Grinstead & Laube and *W. M. Whitney*, for respondent Fidelity & Deposit Company of Maryland.

PARKER, J.—This action was originally commenced by the plaintiff, Dyer Brothers Golden West Iron Works, seeking recovery from the defendant Pederson, and Fidelity & Deposit Company, for the furnishing of structural steel for a large bridge constructed by Pederson under a contract with the city of Seattle; Fidelity & Deposit Company being surety upon the bond furnished by Pederson to secure the faithful performance of the contract, and the payment of laborers,

subcontractors, and materialmen, as prescribed by § 1159, Rem. Code. The plaintiff also sought to have its recovery made a charge upon funds in the hands of the city payable to Pederson upon the contract. The defendant Erickson Construction Company filed its answer and cross-complaint, seeking recovery of compensation from the defendant Pederson and the Fidelity & Deposit Company, and also from the fund, for the furnishing of labor and superintendence in the excavation for the piers of the bridge. Pederson responded to this cross-complaint of Erickson Construction Company by answer and cross-complaint, alleging, in substance, that the Erickson Construction Company had entered upon the work of excavation and partially completed it, in pursuance of an express oral contract with him to do the same for the lump sum of \$18,000, according to the specifications of his contract with the city; that Erickson Construction Company abandoned the work, leaving it unfinished, resulting in his damage in the sum of \$27,431, which amount he necessarily expended in excess of the \$18,000 he would have paid to Erickson Construction Company had the work been completed under its contract. Pederson prayed for recovery of damages against Erickson Construction Company accordingly. A trial of these issues in the superior court for King county, upon the merits, resulted in a decree denying recovery both to Erickson Construction Company and to Pederson. From this disposition of their respective claims, both Erickson Construction Company and Pederson have appealed to this court.

All parties to the action having proceeded upon the theory that it is of equitable cognizance, the trial court concluded that formal findings of fact were unnecessary, and did not make findings apart from the recitals

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in the decree, which, after reciting the making of the original contract between Pederson and the city for the construction of the bridge, reads in part as follows:

“ . . . on or about August 24th, 1915, the defendant Erickson Construction Company entered into a contract with the defendant Hans Pederson for excavation and construction of coffer dams on the said Fifteenth Avenue Northwest Bridge, Seattle, Washington, for the lump sum of \$18,000, upon which construction the defendant Erickson Construction Company entered, and that thereafter the said Erickson Construction Company breached said contract and abandoned the said work, and that, as a result of the said abandonment of said work, and the breach of the said contract and the refusal of said Erickson Construction Company to proceed further, the said Pederson was damaged in the extent of \$23,369.69, with interest at the rate of six per cent per annum from November 4th, 1916, the same being the cost to the said Pederson to complete the contract upon which the said Erickson Construction Company had entered.

“Thereafter and in due time the Erickson Construction Company filed a motion for new trial, and said motion for new trial having come on for hearing, and having been on the 20th day of November, fully argued and heard, the court, on the 24th day of November, 1919, handed down his decision upon the motion for new trial, finding and holding that the whole case was controlled by section X of article VIII, paragraph 2, of the city charter of the city of Seattle, which reads as follows:

“ ‘Bids may be received for all or any part or division of any proposed contract and no contract shall be sublet except for the furnishing of material without the previous consent of the city council.’ ”

and that Hans Pederson had, in violation of said charter provision, sublet the contract in question to the Erickson Construction Co., and that said subletting, being in violation of the city charter, was void, and that Hans Pederson could not recover upon said

contract because of its invalidity, to which, and to all of which, the defendants Hans Pederson and the Fidelity & Deposit Co. of Maryland duly excepted and except.

“It is, therefore, now by the court ordered, adjudged and decreed:

“That the action of Erickson Construction Co. as against Hans Pederson be dismissed, to which counsel for Erickson Construction Co. excepted and except.

“It is further ordered, adjudged and decreed that the action of Hans Pederson on his cross-complaint as against the Erickson Construction Co. be dismissed, to which Hans Pederson excepted and excepts.”

We are not here concerned with the rights of other parties adjudicated by the decree. In so far as these findings may be considered as findings of fact, they were duly excepted to by counsel for Erickson Construction Company. The exception by counsel for Pederson, noted in the decree, is manifestly nothing more than an exception to the court's conclusion of law that the subcontract between him and Erickson Construction Company was void because not consented to by the city council, as prescribed in the city charter provision above quoted in the recitals of the decree.

It seems to be necessary for us to first answer the inquiry, Was there a subcontract, apart from the question of its validity, entered into between Erickson Construction Company and Pederson, as recited in the decree, for the performance of which, by Erickson Construction Company, it was to be paid by Pederson the lump sum of \$18,000? That the trial judge was so convinced, treating the question purely as one of fact, there seems no room for doubting, in view of the recitals in the decree, above quoted. A reading of the evidence, as set forth in the abstracts thereof prepared by counsel for the respective parties, convinces us, as

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manifestly it did the trial court, that there was such a meeting of the minds of Erickson Construction Company and Pederson in the making of the contract; that its terms were certain and well understood by each; that Erickson Construction Company commenced and proceeded in the performance of the contract for a period of some three months before abandoning the work, then notifying Pederson that it would not proceed further with the work; and that Pederson had then paid to Erickson Construction Company upon the contract sums aggregating \$9,898. We think it would be quite unprofitable to here review the evidence in detail.

The principal contentions here made by counsel for Erickson Construction Company seem to be that, in any event, the contract between it and Pederson was void and of no effect, because of the failure of the city council to consent thereto; that therefore it is entitled to recover in this action as upon *quantum meruit*, and have its recovery measured by the reasonable value of the labor and services actually furnished by it to Pederson, irrespective of the compensation therefor specified in the contract; and that, because of the invalidity of the contract, Pederson has no basis upon which to rest his counterclaim for damages by reason of the alleged breach thereof by Erickson Construction Company. Counsel for Pederson contend that the contract was not void, or even voidable, as between him and Erickson Construction Company, and that therefore he is entitled to damages as against it, because of its breach of the contract. We feel constrained to hold that the contract was voidable at the election of Erickson Construction Company at any time prior to the consenting thereto by the city council, and, when timely so avoided, it ceased to exist or have any controlling influence upon

the rights of either party thereto claimed as then or thereafter accruing under it. We are unable to escape this conclusion, in view of the express provision of the city charter that "no contract shall be sublet except for the furnishing of material, without the previous consent of the city council." This is not a mere provision of the original contract entered into between Pederson and the city for the construction of the bridge, but it is a positive declaration of law. Counsel for Pederson rely upon our decisions in *Wohlforth v. Kuppler*, 77 Wash. 339, 137 Pac. 477, and *Crane Co. v. Maryland Casualty Co.*, 102 Wash. 59, 172 Pac. 866.

We think a careful reading of those decisions will render it plain that in neither of them was there involved any question of a subcontract being void or voidable because entered into in violation of a positive provision of statutory law; but that in those cases there was under consideration only the fact of the failure to observe provisions in the principal contract relating to the necessity of consent on the part of public officials to the entering into subcontracts by the principal contractor. Under the peculiar facts of those cases, the subcontracts were recognized as enforceable by the court. This contract might be so recognized if it had been fully performed by Erickson Construction Company, instead of being abandoned by it and thereby rendered void as to obligations arising under it in the future. Being of the opinion that this contract was voidable at any time at the election of either of the parties thereto, it not being consented to by the city council, and when so avoided, as it was by Erickson Construction Company's abandonment of the work when it notified Pederson of such action, the contract we think could no longer be the basis of a right of action for its breach, though, as we shall presently see,

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its terms still furnish the measure of Erickson Construction Company's compensation for services rendered by it to Pederson thereunder. Had the work been entirely completed by Erickson Construction Company, as contemplated by the contract, and the work accepted by the city, manifestly there would have been no cause of action in favor of Pederson for its breach. In such event, the terms of the contract would, in any event, have measured the amount of compensation Erickson Construction Company would lawfully be entitled to receive for services rendered thereunder. The contract being so fully performed by Erickson Construction Company, and it not being immoral in its nature, there would be nothing in the way of the court giving it full force and effect, when nothing remained for the court to determine save the question of the measure of the Erickson Construction Company's compensation for its full performance.

Notwithstanding the contract was not in law enforceable, strictly as such, by either party thereto, both parties were proceeding under it, assuming that it was valid and binding as to them, up until the time of the abandonment of the work by Erickson Construction Company, at which time Pederson had paid to it upon the contract, \$9,898, being more than half of the total contract price for the work. At that time, we think it safe to assert, in the light of the evidence, the work which Erickson Construction Company undertook to do for the lump sum of \$18,000 was approximately half completed. The evidence does not show this fact with exactness, but we think, in view of the total cost of the work and the amount Pederson was compelled to expend in its completion, it is, in any event, fairly certain that Erickson Construction Company was paid by Pederson in the aggregate as much as it was entitled

to, if its compensation at the time of its abandonment of the work is to be measured with reference to the total compensation of \$18,000, agreed upon in the contract.

Now this contract, while prohibited by law, and therefore in a sense against public policy, was not within itself immoral. It was not of that class of contracts which the law condemns in that extreme sense of refusing all claimed relief to the parties thereto rested upon acts performed under and in compliance with its terms. In other words, the contract was not of that class as to which the court will leave the parties where it finds them, as to all claimed rights of one as against the other rested upon and growing out of acts done in the performance of the contract. The fact that such a contract is voidable, since it is not immoral, does not mean that one party may keep, without compensation, that which he has received from the other under the contract; nor that one party, after he has rendered service to the other by the doing of acts, free from taint of immorality or want of consideration, as contemplated by the contract, shall have no right of compensation. We think that enforceable legal obligations may be so created in favor of one party to the contract as against the other, though the contract be voidable and unenforceable as an unexecuted contract. This, we think, is the position we find these parties in, or rather the position they would be in were it not for the fact that the legal obligation arising in favor of Erickson Construction Company, as against Pederson, has been already fully satisfied by Pederson by the payment by him of approximately one-half of the agreed compensation for the work furnished and performed by the Erickson Construction Company, which was, as we have seen, approximately one-half of the work it agreed to furnish and perform.

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Are we correct in measuring the amount Erickson Construction Company was entitled to receive for its part performance of the contract, by reference to the \$18,000 specified in the contract as the entire compensation it was to receive for the work? It seems to us these parties are simply in the position they would be had the contract been in all respects valid and terminated by either of them under legal right to so do. In such cases we think this court is committed to the view that, notwithstanding the contract has no binding force after such termination, its terms are to be looked to for the measuring of the amount of recovery one party thereto is to receive from the other party as compensation for something furnished such other party under the terms of the contract. *Noyes v. Pugin*, 2 Wash. 653, 27 Pac. 548; *Chase v. Smith*, 35 Wash. 631, 77 Pac. 1069; *Bookhout v. Vuich*, 101 Wash. 511, 172 Pac. 740. It is plain that, under the terms of this contract, there is no difficulty in measuring the value of the service furnished and rendered by Erickson Construction Company to Pederson by the terms of the contract which specifies a fixed compensation of \$18,000 for the whole of the work. The portion of the whole of the work which was performed being determinable with a fair degree of certainty, it seems plain to us that Erickson Construction Company was entitled to receive a like portion of the agreed total compensation. This, as we have seen, it has received.

We conclude that Erickson Construction Company cannot recover, because the compensation it was entitled to receive for work done under its contract with Pederson has been fully satisfied by payment on the part of Pederson; and that, since the contract was rendered nonenforceable as a whole at the election of Erickson Construction Company, Pederson has no cause of action for breach thereof.

The judgment is affirmed. Neither party will recover costs in this court.

HOLCOMB, C. J., TOLMAN, MITCHELL, and MAIN, JJ., concur.

ON REHEARING.

[*En Banc*. April 14, 1921.]

BRIDGES, J.—The foregoing Department opinion in this case contains a complete recital of the facts, and we refer to that opinion. The only facts necessary for us here to recite are as follows: The charter of the city of Seattle contains the following clause:

“Bids may be received for all or any part or division of any proposed contract, and no contract shall be sublet except for the furnishing of material, without the previous consent of the city council.”

The city of Seattle entered into a contract with the defendant Pederson, which provided that the latter should furnish all material and labor and construct a certain bridge within that city. This contract provided that all provisions of the charter and ordinances of the city, in so far as they were material, should become a part thereof. Thereafter Pederson and the defendant Erickson Construction Company entered into an oral contract whereby the latter was to do a certain portion of the work required by the city contract, for which it was to receive from Pederson the sum of \$18,000. The construction company, having performed a part of the work provided by its contract, terminated it and refused to do any further work, because the written consent of the city for the making of the contract between it and Pederson, as provided by the city charter, had not been obtained. Pederson thereafter completed the work which by the terms of the contract the construction company was to do. As a defendant in this action, the construction company filed a cross-

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complaint against its co-defendant Pederson, seeking to recover a balance claimed to be due and owing on account of the work performed by it, and Pederson filed a cross-complaint against his co-defendant Construction Company, seeking to recover damages because of the failure of the construction company to complete the contract between them. Only the rights under the two cross-complaints are now involved. We adopt those portions of the Department opinion which dispose of the cross-complaint of the Erickson Construction Company and the holding that the construction company has been paid by Pederson all it was entitled to receive for the work performed by it. We do not, however, adopt those portions of the Department opinion which hold that Pederson cannot recover under his cross-complaint for damages. On this question the construction company argues that it had the right to terminate its contract with Pederson because it was in violation of the city charter provision against subletting, and that such contract was void, or at least voidable at its election. Pederson denies the right to terminate the contract and contends that he should recover on his cross-complaint because (1) his contract with the construction company did not violate the city charter provision, and, (2) if it did, it was good and enforceable between the parties to it.

Elaborate arguments have been made on the construction to be given to that provision in the charter which prohibits subletting of contracts, and on the question whether the Erickson Construction Company-Pederson contract violated that provision. But we do not find it necessary to decide this question. If it be conceded that this charter provision is applicable to the contract between Pederson and the construction company, and that such contract was in violation of

that provision, it does not follow that Pederson may not recover on his cross-complaint. The provision against subletting was for the sole benefit and protection of the city, and no one else would have the right to claim its protection or seek benefits under it. It could not have the effect of invalidating or making void the Pederson-Construction Company contract. The most it could do would be to authorize the city, if it saw fit, to terminate its contract with Pederson. The subcontract, even if it was in violation of the charter, was good and valid as to, and binding upon, the parties to it, at least, up to the time the city should take some affirmative action. Here the city did nothing more than refuse to recognize the construction company; it did not terminate its contract with Pederson, nor in any way interfere with the construction company in the performance of its subcontract. From all that appears from the record, the construction company could, without opposition from anyone, have completed its contract with Pederson. Suppose Pederson had terminated his contract with the construction company, for the identical reason given by the latter for refusing to go ahead with the work, and the construction company had sued Pederson for a breach of the contract, he could not have successfully defended. If, then, Pederson would not have had any right to terminate his subcontract on those grounds, we can see no reason why the construction company could terminate it on the same ground. An examination of the leasehold cases will be enlightening. In the case of *Bemis v. Wilder*, 100 Mass. 446, the court, in discussing this question, said:

“The plaintiffs claim as assignees of the defendant’s interest in the lease, by an unrecorded assignment from the defendant’s assignee in insolvency. The court declined to rule that the lease was not transferred to the

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plaintiffs without the consent in writing required in its terms, and that the assignment from the assignee in insolvency was insufficient to give a right to the plaintiffs, as against the defendant, for the reason that it had not been recorded. There is no error in these refusals. It is not for the defendant to set up the breach of his own covenant not to lease or underlet, to defeat the plaintiff's right. That stipulation was inserted for the benefit of the lessor and those claiming under him, who alone can take advantage of any breach. The stipulation here is in the form of a covenant, and not a condition with a right of entry reserved. But if the agreement had been of the latter description, the lease would have been valid until the lessor had exercised his option to terminate it, which he has never done."

In *Garcia v. Gunn*, 119 Cal. 315, 51 Pac. 684, it is said:

"It seems to be the law that where there is a clause in a lease that it shall not be assigned without the previous consent of the lessor, and there is a breach of the covenant not to assign, the lessor has only the option to forfeit the lease for the breach of the condition, and that the assignment is not void but passes the term, and the only remedy is for breach of the covenant . . . ; and it has been held that the assignment is voidable only at the option of the lessor or his representatives."

In 24 Cyc. 968, the following rule is laid down:

"Restrictions against assignment or subleases, whether imposed by statute or by the terms of the lease, are intended for the benefit of the lessor and his assigns, and if neither of these object to a breach of the restriction no one else may do so. One to whom the term has been assigned in breach of the restriction cannot set up the breach in defense of an action brought against him by the lessor on the lease, or in defense of an action brought against him by the lessee on obligations incident to the assignment; nor can a sublessee of the assignee set up the breach in defense of an ac-

tion brought against him by the assignee on the sublease."

In 18 Am. & Eng. Ency. Law (2d ed.) 660, it is said:

"So also an assignment of a lease, though in violation of a provision against assignment, carries title to the leasehold as between the assignee and a stranger, or as between the lessee and his assignee, or as between the assignee and subtenants of the lessee. But an assignment without the consent of the lessor will not transfer to the assignee the right to sue the lessor on his covenants in the lease, though they were such as would have run with the term had the leasehold been assignable."

To the same general effect see *McGhee v. Cox*, 116 Va. 718, 82 S. E. 701, Ann. Cas. 1916E 842; *Potts Drug Co. v. Benedict*, 156 Cal. 322, 104 Pac. 432, 25 L. R. A. 609; *Thompson & Co. v. Gray*, 15 Ky. Law 783; *Spear v. Fuller*, 8 N. H. 174, 28 Am. Dec. 391; *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 21 N. E. 920, 16 Am. St. 274; *Chicago Attachment Co. v. Davis Sewing Machine Co.*, 33 Ill. App. 362, 25 N. E. 669.

It would seem that, upon authority and reason, a provision in a lease prohibiting subletting is for the benefit of the lessor and does not in itself make a contract of subletting void, but leaves it good as between the parties to it. If such be the law with reference to leases, we see no reason why it should not be the law with reference to contracts such as the one here involved. We believe an examination of the contract cases will support us in this view.

In the case of *Crane Co. v. Maryland Casualty Co.*, 102 Wash. 59, 172 Pac. 866, the facts were that the state let a certain contract to the Beers Building Company. It provided as follows: "The contractor shall not assign this contract nor sublet any portion thereof without the written consent of the board of control and

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the bonding company." In accordance with the provisions of the contract and the statutes of the state, Beers Building Company gave a bond for the performance of the work, with the Maryland Casualty Company as surety. Later, the building company sublet the whole of the work to Musgrave and Blake. The latter purchased from Crane Company materials for which they did not pay. Crane Company sued Musgrave and Blake, the subcontractors, and the surety on the original bond for the amount of its unpaid bill. The surety company defended on the ground that it was not liable either to Musgrave or Blake or the Beers Building Company, because neither it nor the state had consented in writing or otherwise to the making of the subcontract. We said:

"Many authorities are cited and reviewed by counsel to support the proposition that the stipulation in the contract between Beers Building Company and the state that it should not 'assign' nor 'sublet' the contract, or any portion thereof, without the written consent of the 'board of control and the bonding company' is a valid and binding stipulation. We may concede this for the sake of argument, yet we think this falls far short of calling for a holding in this case that the casualty company is not liable upon its bond to both Musgrave and Blake and Crane Company. Reading this stipulation in the contract between Beers Building Company and the state in the light of the express condition in the bond and the statute in pursuance of which the bond was executed, it seems to us that the stipulation means nothing more than that no assignment of the contract and no subcontract made thereunder without the written consent of the board of control and the bonding company shall be of any avail in the working of a change in the contractual relations and the obligations arising thereunder as between the state, Beers Building Company and the bonding company which should thereafter become surety upon the bond. In other words, this provision, we think, means

only that there shall not be any substitution of parties in place of Beers Building Company in its contract with the state, releasing that company from any obligation under its contract without the consent of both the state and the bonding company which should thereafter become surety upon the bond."

In the case of *Burck v. Taylor*, 152 U. S. 634, the court, in discussing a similar provision in a contract, said:

"The express declaration that so far as the United States are concerned a transfer shall work an annulment of the contract, carries, by clear implication, the declaration that it shall have no such effect as between the contractor and his transferee. In other words, as to them, the transfer is like any other transfer of property, and controlled by the same rules. Its invalidity is only so far as the government is concerned, and it alone can raise any question of the violation of the statute. The government in effect, by this section, said to every contractor, You may deal with your contract as you please, and as you may deal with any other property belonging to you, but so far as we are concerned you, and you only, will be recognized either in the execution of the contract or in the payment of the consideration."

To the same effect see *Pierce v. Walker*, 23 Iowa 424; *Goodman v. Niblack*, 102 U. S. 556; *Jones v. Moncrief-Cook Co.*, 25 Okla. 856, 108 Pac. 403.

It is asserted, however, that while the rule which we have announced may be the correct one as applied to prohibitions against assignments and subletting contained in the lease or contract as a part of the voluntary act of the parties, it should not be applied in a case like this, where the prohibition is found in a city charter or in a statute. The opinion of the Department accepted this view. We are unable to see any difference, unless it be that in the one instance the prohibition may be waived and in the other cannot be.

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But the question of waiver is not in this case. 24 Cyc. 968, *supra*. The trial court seems, in the first place, to have reached the same conclusion we have and ordered judgment for Pederson, but on motion for new trial changed its view.

We hold that Pederson is entitled to recover on his cross-complaint. It seems to have been conceded that if he was entitled to any affirmative judgment it should be in the sum of \$23,369.69, with interest.

The judgment in so far as it dismisses the cross-complaint of the Erickson Construction Company, is affirmed, but in so far as it dismisses the cross-complaint of Pederson, it is reversed and remanded with instructions to enter judgment in favor of Pederson and against the Construction Company, in the sum of \$23,369.69 with interest from November 4, 1916.

MACKINTOSH, MAIN, FULLERTON, TOLMAN, MITCHELL, and MOUNT, JJ., concur.

PARKER, C. J. (dissenting)—I am now willing to concede that there is no difference, in legal effect, between a contract prohibition against subletting and a charter or statutory prohibition against subletting, as applicable to a situation such as we have in this case; and that, insofar as the Department opinion, written by myself, seems to recognize such a difference, in legal effect, it is erroneous. I am, however, still convinced, in view of the executory character and condition of the construction contract here in question at the time it was, as I insist, terminated, that the conclusion reached in the Department opinion is correct and should be adhered to. I therefore dissent.

HOLCOMB, J., concurs with PARKER, C. J.

[No. 15744. Department One. September 8, 1920.]

CHARLES G. SCHAEFER, *Appellant*, v. E. F. GREGORY
COMPANY, *Respondent*.¹

EMINENT DOMAIN (93)—PERSONS ENTITLED—VENDEE—EXECUTORY CONTRACT. The vendee in a forfeitable executory contract for the purchase of land acquires no title to or interest in the land until the contract is fully performed, and hence is not a "party interested" or entitled to the award in condemnation proceedings to acquire land for the Camp Lewis army post, under Laws of 1917, p. 2, ch. 3.

VENDOR AND PURCHASER (160)—REMEDIES OF PURCHASER—RECOVERY OF PRICE—FAILURE OF TITLE. The vendor's breach of the contract through inability to convey title by reason of the condemnation of the property for the uses of the government, constitutes a complete failure of consideration, entitling the vendee to recover all sums paid by him on the contract.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered August 1, 1919, upon sustaining a demurrer to the complaint, dismissing an action on contract. Reversed.

Hayden, Langhorne & Metzger, for appellant.

Sullivan & Christian, for respondent.

MACKINTOSH, J.—The respondent, then the owner of certain real property situated in Pierce county, Washington, on January 28, 1914, entered into an executory contract with appellant for its sale, the purchase to be made on the installment plan, the contract providing for forfeiture in the event that the appellant should fail to make any of the payments when due; time was made the essence of the contract, and respondent agreed that, upon the payments being made as provided for, and the performance by the appellant of his agreement, "the said party of the first part hereby covenants and agrees to convey to said party of the

¹Reported in 192 Pac. 968.

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second part by good and sufficient warranty deed." The contract was recorded on January 2, 1917, and the appellant faithfully performed all the obligations called for by the contract and made tender of the full amount due and demanded his deed, which was refused for the reason that, under Ch. 3, Laws of 1917, p. 2, the property had been condemned by Pierce county in December, 1918, for the purpose of the Camp Lewis army post site. The award made by the jury was paid into court and the decree was entered. Upon respondent's failure to deliver the deed to the appellant, the latter began this action to recover the payments that he had made on the contract and the taxes paid by him, with interest. A demurrer was interposed to the complaint and sustained, and judgment of dismissal was thereupon entered. This appeal is prosecuted therefrom.

In the condemnation proceedings both respondent and appellant were made parties, but the appellant made no appearance. The jury returned a verdict in the sum of \$584, which was an amount less than the appellant had paid on the contract price at the time of the entry of the decree of appropriation.

The respondent contends that the appellant's only remedy was to apply in the condemnation proceedings for the award. The appellant contends that the respondent, having breached its contract, and being unable to perform, that he, the appellant, is entitled to recover all the sums paid by him on the contract, for the reason that there has been an entire failure of consideration.

The question as stated by the appellant is this: Is the holder of a forfeitable executory contract for the purchase of land an "owner, encumbrancer, or other party in interest," within the meaning of Ch. 3, Laws of 1917, p. 2, and consequently obliged to look to the

jury's award as his only source of reimbursement. Or, stating the question in another way, it is whether the parties to an executory contract of sale, who are duly and regularly made parties to a condemnation proceeding under Ch. 3, Laws of 1917, p. 2, are confined to an adjustment of their interests in the condemnation suit, and must they look to the proceeds of the judgment in that suit for whatever compensation they are entitled to by reason of the vendor's loss of the land he has agreed to convey; or, whether the vendee, under an executory contract, can ignore the condemnation proceedings and bring an independent action against the vendor because the vendor has been rendered unable to convey by reason of the condemnation.

Where the vendor is unable to perform his contract and make delivery as he has agreed to, the vendee is entitled to recover the money which he has paid on the contract, and such damages as he may have sustained by reason of the vendor's breach. *Williams v. Hillman Investment Co.*, 48 Wash. 695, 94 Pac. 653; *Munson v. McGregor*, 49 Wash. 276, 94 Pac. 1085; *Herbert v. Hillman*, 50 Wash. 83, 96 Pac. 837; *Colpe v. Lindblom*, 57 Wash. 106, 106 Pac. 634.

This general rule has not been applied to facts such as we have presented in this action. Here the vendor's failure to convey has been occasioned by the assertion of the sovereign power of its right to take the property for public use, and the impossibility of performance is due to no fault of the vendor. In *Cowley v. Northern Pac. R. Co.*, 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559, this court held that, where the performance of a contract became illegal by the passage of a statute, the contractor could not be held for damages for failure to further perform the contract; the court saying:

"The plaintiff conveyed the property to the defendant upon the faith of defendant's promise to perform

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conditions which were then wholly lawful but which, after a substantial part performance, became unlawful without any contributing cause upon the part of either party. The full performance has not been arrested by any act or omission of the defendant, but by the Congress of the United States acting within its constitutional powers. It follows from what has been said, that the defendant cannot be mulcted in damages because of, and only because of, its observance of a law making further performance of the contract on its part impossible."

It is argued here that the appellant is not entitled to recovery because the respondent, by no fault of its own, but because of the action of a superior authority, has made the further performance of the contract by it impossible.

The *Cowley* case is to be distinguished by the fact that the performance of the contract had been made illegal and contrary to public policy by statutes passed subsequent to the making of the contract, whereas here Ch. 3, Laws of 1917, p. 2, which permitted the condemnation of this property, did not make the performance of the contract illegal or contrary to public policy, but merely prevented the respondent from performing because the condemnation disposed of the subject-matter of the contract. The act removed the land from the sphere of individual contract, and did not render the contract illegal or violative of public policy. In this case the appellant is not seeking damages for the respondent's failure to do anything that has been made unlawful; he is only seeking the restoration of that which he has paid. The respondent's agreement was to convey certain land when certain payments had been made by the appellant. The payments were made, the conveyance was not, and when that conveyance was made impossible of performance, the appellant argues that there was then a failure of consideration

for the payments that had been made, and that he should be entitled to recover the same in an action for money had and received.

Section 9, Ch. 3, Laws of 1917, p. 7, provides that, in the condemnation petition, the name of each and every "owner, encumbrancer or other person or *party interested*" or in possession of the property, shall be made a party to the action, and that a jury shall be impaneled to determine the compensation of "owners . . . and . . . all tenants, encumbrancers and *others interested*," for the taking of the property.

Section 14, Ch. 3, Laws of 1917, p. 11, provides further:

"The jurors at such trial shall make in each case a separate assessment of damages which shall result to any person, corporation, or company, or to the state, or to any municipal or public corporation or other party, by reason of the appropriation and use of such land, real estate, premises, or other property by such county, as aforesaid, and shall ascertain, determine and award the amount of damages to be paid to said owner or owners respectively, and to all tenants, encumbrancers, and *others interested* for the taking or injuriously affecting such land, real estate, premises, or other property . . . Judgment shall be entered by the court . . . for the amount of the damages awarded to such owner or owners respectively, and to all *tenants, encumbrancers, and others interested*, for the taking or injuriously affecting such land . . ."

Section 16, Ch. 3, Laws of 1917, p. 12, provides further:

"The court . . . shall enter an order that Pierce county shall have the right at any time thereafter to take immediate possession of or damage the property in respect to which such compensation shall have been so paid, and thereupon the legal title to any property so taken shall be vested in fee simple in Pierce county . . ."

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Section 18, Ch. 3, Laws of 1917, p. 13, further provides:

“Whenever claim is made to any money paid into court, as provided in this act, the claimant may apply to the court therefor, and upon furnishing evidence satisfactory to the court that he or it is entitled to the same, the court shall make an order directing payment to such claimant of the portion of such money he or it shall be found entitled to, after first deducting the amount found to be due against the particular tract of land . . . but, if, upon application, the court, or judge thereof, shall decide that there are conflicting claims to the award, he may proceed to hear and determine the same.”

Section 21, Ch. 3, Laws of 1917, p. 14, also provides:

“Owing to lack of proper and adequate military training and preparedness, the public peace and safety are and will continue to be endangered, and emergency exists and this act is enacted for the support of the federal and state governments, as well as under the police power of the state, declared to be and is necessary for the immediate preservation of the public peace and safety, and shall take effect immediately.”

From these sections the respondent argues that the legislature intended that every one having a right or interest in the property should be made a party and their rights determined in the condemnation suit. The appellant argues that the statute does not include one holding an executory contract of sale.

It becomes, therefore, necessary to determine whether the holder of a forfeitable executory contract for the purchase of land is a “party interested” in the land sought to be condemned.

We have held that a contract such as the one before us, while it remains executory and forfeitable, creates no interest in the land in the vendee, and that he has no legal or equitable title to or interest in the land

until the contract has been fully performed; that a judgment obtained against the vendee would not be a lien upon such property. *Martin v. Matthews*, 10 Wash. 176, 38 Pac. 1001; *Pease v. Baxter*, 12 Wash. 567, 41 Pac. 899; *Churchill v. Ackerman*, 22 Wash. 227, 60 Pac. 406; *Johnson v. Sekor*, 53 Wash. 205, 101 Pac. 829; *Younkman v. Hillman*, 53 Wash. 661, 102 Pac. 773; *Tieton Hotel Co. v. Manheim*, 75 Wash. 641, 135 Pac. 658; *Converse v. LaBarge*, 92 Wash. 282, 158 Pac. 958.

As was said in this last case:

“Contracts of this sort confer title in the contract purchaser only when fully performed on his part, or performance in so far as it is capable of being performed on his part. Until that time, such contracts are merely initiatory of title. By performance they ripen into title, either legal or equitable, but fail of either by nonperformance.”

Again in *Younkman v. Hillman*, *supra*, it was said:

“The obligation of the vendor in these contracts is similar to that of the obligor in a bond for a deed, and it is held that ‘a bond to convey land is not a title, but simply a contract to convey title’ . . . We cannot regard respondents as purchasers, there being no investment of any title in them; nor, under the contract, any passing of title until a compliance with its terms.”

The effect of these decisions is to hold that, under such contracts, the vendee has no interest in the land; that he has no right *in rem*, but one *in personam* against the vendor in the event of breach upon the vendor's part. Under these decisions the vendee had no interest in the land at the time of the condemnation proceedings, and we cannot say that Ch. 3, Laws of 1917, makes any change in the law as to the persons who shall be made parties to condemnation proceedings or shall be entitled to the award in such proceedings.

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Chapter 3, Laws of 1917, p. 2, differs, as far as the question we are here considering is concerned, in no way from the general statutes in relation to eminent domain proceedings (Rem. Code, §§ 891-936), as will be seen by reference to § 895, which provides:

"And the jurors at such trial shall make in each case a separate assessment of damages which shall result to any person, corporation or company, or to any county by reason of the appropriation and use of such land, real estate, premises or other property, and shall ascertain, determine and award the amount of damages to be paid said owner or owners respectively, and to all tenants, encumbrancers, and *others interested*, for taking such land, real estate, premises, or other property so taken."

Under this general statute it has been held that the owner of the fee at the time of the award is the only one entitled thereto. *In re Seattle*, 26 Wash. 602, 67 Pac. 250. In that case it was said:

"It has been uniformly held that the right to damages for an injury to property is a personal right belonging to the owners of the property, which will not pass by deed unless expressly conveyed."

See, also, *Kakeldy v. Columbia & P. S. R. Co.*, 37 Wash. 675, 80 Pac. 205; *Silverstone v. Harn*, 66 Wash. 440, 120 Pac. 109; *Carton v. Seattle*, 66 Wash. 447, 120 Pac. 111; *Damon v. Ryan*, 74 Wash. 138, 132 Pac. 871, Ann. Cas. 1917 A 286; *In re Twelfth Avenue South*, 74 Wash. 132, 132 Pac. 868, Ann. Cas. 1915 A 730.

"It is a settled general rule that when land is taken under the power of eminent domain, compensation therefor shall be paid to the owner of the fee at the time compensation is taken." 10 Am. & Eng. Ency. Law (2d ed.), p. 1188.

The cases establish that, under the general eminent domain statute, the vendor alone is entitled to the

award, and nothing in the language of Ch. 3, Laws of 1917, indicates that the general rule should not apply in the instant case, and the vendor must suffer the loss if the award is not as large as the price for which he had contracted to convey, and is entitled to the profit if the condemnation jury values the property at more than he has agreed to sell for.

The condemnation provided for by Ch. 3, Laws of 1917, p. 2, was a special act to aid the Federal government in the establishment of any army post necessitated by the existence of a state of war, and presents no reason why the court should give a different interpretation to the language of that act than has already been given to the general condemnation acts, nor any reason for changing the rule long established as to the relation existing between vendors and vendees in executory forfeitable contracts for the sale of real property.

The respondent cites *Stevenson v. Loehr*, 57 Ill. 509; *Burns v. Koochiching Co.*, 68 Minn. 239, 71 N. W. 26; *Clarke v. Long Island Realty Co.*, 126 App. Div. 282, 110 N. Y. Supp. 697, which are cases from jurisdictions holding that, under an executory contract of sale of real estate, the vendee becomes an equitable owner, subject only to the right of the vendor to the payment of the purchase price. Under our decisions which hold that the vendee has no such right, these cases can have no authority.

The respondent also calls attention to the case of *Olson v. Seattle*, 30 Wash. 687, 71 Pac. 201, where this court allowed the vendee to maintain an injunction where the public authorities were seeking to take the land for public uses without making compensation. An examination of that case will show that, as a matter of fact, the contract there was no longer executory; that the vendee had completed the payments and had re-

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ceived deeds to a part of the land, and that there was some delay in the delivery of the other deeds. The court held that, under these facts, it being an equitable action, the vendee was the owner, and coupled with this was the fact that he was in possession. In the latter part of the opinion it is stated:

“ . . . one holding real property under contract of purchase with the owner, and who has paid a substantial portion of the purchase price, has such an interest therein as will entitle him to compensation before the property can be taken or damaged for a public use.”

This language is not necessary to the decision of the case, the court having already found, as we have indicated, that the vendee, having done everything necessary to be done, he would in equity be considered the real owner, and furthermore, the language quoted is out of line with the decisions which we have hereinabove cited holding to the contrary. The case cannot be controlling here for that reason.

We come to the conclusion, therefore, that, under the well settled law of this state, the vendee in a forfeitable, executory contract of sale has no legal or equitable interest in the property, the subject-matter of the contract, and although the contract may be of record, he is not one of the parties necessary to the condemnation proceedings, and that a condemnation proceeding having prevented the performance by the vendor of his covenant to transfer when the full payments should have been made, does not create an interest in the award in favor of the vendee, and that performance having been made impossible by the assertion of the sovereign's right of condemnation, that thereby there has been created a failure of the consideration such as entitled the vendee to the return of the money which he has paid in compliance with the contract. For these

reasons, the demurrer should have been overruled. Judgment is reversed.

HOLCOMB, C. J., PARKER, MAIN, and MITCHELL, JJ., concur.

[No. 15902. Department One. September 8, 1920.]

*In the Matter of the Condemnation of WEST MARGINAL
WAY, SEATTLE.*

THE CITY OF SEATTLE, *Respondent*, v. HARRIET L.
PEABODY *et al.*, *Appellants*.¹

MUNICIPAL CORPORATIONS (267-1)—IMPROVEMENTS—ASSESSMENTS—BENEFITS—REVIEW. The report of eminent domain commissioners as to benefits to property from the establishment of a street, fortified by the findings and judgment of the trial court in confirmation thereof, will not be disturbed unless the evidence so clearly preponderates as to indicate arbitrariness and manifest oppression.

SAME (267-3)—ASSESSMENTS—REVIEW—ARBITRARY ACTION. While ordinarily the question of benefits to property from a public improvement is one of fact, the finding of which by the eminent domain commissioners will not be disturbed except for arbitrariness or manifest abuse, yet when it is obvious from the physical condition of the property, its locality, environment and character of the improvement, that an assessment should not be laid upon the property for the purpose, and that to do so would amount to an exaction from the property owner which he should not be obliged to make as a special assessment, the courts will interfere to prevent a consummation of the injustice.

SAME (241)—ASSESSMENTS—SPECULATIVE OR INTENDED BENEFITS. The eminent domain commissioners in fixing the amount of assessments or determining the question of benefits to property from a local improvement should take into consideration the present as well as the future use to which the property is reasonably adaptable, yet the benefit must be a present one and immediately accruing from the improvement in question, and landowners cannot be assessed for speculative or intended benefits which may never be realized.

SAME (241, 267-2)—ASSESSMENTS—BENEFITS—REMOTE OR SPECULATIVE BENEFITS—EVIDENCE—SUFFICIENCY. An assessment on prop-

¹Reported in 192 Pac. 961.

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erty for benefits from a proposed street is invalid as resting upon a fundamentally wrong basis, where the property, located on an island, is separated from the proposed street by a navigable waterway subject to the control of the Federal government and by privately owned property abutting thereon, and the street can only be reached by a bridge constructed over the waterway at large expense and then on through the privately owned property, the plans for which are not contemplated at the present time, nor any assurance of such in the reasonably near future.

Appeal from a judgment of the superior court for King county, Frater, J., entered September 8, 1919, confirming an assessment for a local improvement, after a hearing before the court. Reversed.

Bronson, Robinson & Jones, for appellants.

Walter F. Meier, George A. Meagher, and Charles T. Donworth, for respondent.

MITCHELL, J.—An appeal has been taken by certain property owners from a judgment of the superior court confirming assessments upon their property, made by a board of eminent domain commissioners to meet the costs of a local improvement in laying off, opening, extending and establishing a street known as West Marginal Way, in the city of Seattle.

Appellants' property, known as the Kellogg Acre Tracts, consists of about thirty acres, and is entirely surrounded by the navigable waters of the Duwamish river. Between the island and the west bank of the stream, the waterway varies from two hundred fifty to six hundred feet in width, and is subject to the ebb and flow of the tide. West Marginal Way runs northerly and southerly, is located on the west side of the river, and, in a general way, parallels it for a considerable distance both north and south of the island, being separated from the waterway west of the island by privately owned property, varying in width, according

to the widening of the river, from one hundred to five hundred feet, until it reaches a point near the north end of the island, where, on account of the semi-circular form of the waterway, the street is still further separated from the waterway by property platted into lots and blocks. The island is in no way accessible except by the waterways on each side; nor is there in contemplation at this time the establishment of any suitable bridge or other means to connect the island with West Marginal Way or any of the streets crossing it. It appears that some time ago preliminary steps, whether private or official is not shown, were taken to have the waterway west of the island vacated, but the project met with such a storm of protest from the owners of property abutting on the west front of the waterway that it was abandoned.

The only objection made, and the sole question presented by the appellants, Harriet L. Peabody, Rosemary McDougall and Annie A. McDougall, is that their property will receive no special benefit from the establishment of the street and should not be assessed in any sum whatever for the costs and expenses of improvement. It is the well established rule in this state, and generally, that the report of the commissioners, fortified by the findings and judgment of the trial court in confirmation thereof, will not be disturbed unless the evidence so clearly preponderates as to indicate arbitrariness and manifest oppression. *In re Third, Fourth & Fifth Avenues, Seattle*, 55 Wash. 519, 104 Pac. 799.

"It is also elementary that the whole theory of special assessment is based on the doctrine that the property against which it is levied derives some special benefit from the local improvement." *Northern Pac. R. Co. v. Seattle*, 46 Wash. 674, 91 Pac. 244, 123 Am. St. 955, 12 L. R. A. (N. S.) 121.

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It is defensible only on that theory. *East Hoquiam Co. v. Hoquiam*, 90 Wash. 210, 155 Pac. 754.

It is the judgment and theory of the commissioners, and other witnesses for the city, substantially as testified to by one of the commissioners, that the establishing of West Marginal Way "accomplishes something in my estimation to develop or make possible for future development that property lying west of the Duwamish Waterway (the waterway on the east side of the island), coupling together the entire distance from the extreme north end where it starts in at First avenue south, making it possible for a highway to be operated for the development of railway spurs, or, if you please, street railway spurs." Their testimony frankly admits the proposed street will be of no use to appellants' property unless the waterway west of the island is bridged at some place, not located, thence on by some way, undefined, to West Marginal Way. It is further assumed that a bridge will be built at some future date when the Kellogg Acre Tracts, now unimproved, shall have become the site of an industrial plant, justifying the private expense of a way out to West Marginal Way. But nothing of this sort is planned, contemplated or projected at the present time at either public or private expense; nor is there any assumption or assurance thereof in the reasonably near future.

Oftener than otherwise, it is difficult to clearly decide upon the dividing line between property that is specially benefited and that which is not, by the establishment of a new public improvement. Ordinarily, the question is one of fact, hence the respect so nearly approaching verity with which the courts endow the findings and conclusions of eminent domain commissioners. There is, however, a dividing line, and when it is plainly obvious from the physical condition of the

property involved, its locality, environment, and the character of the improvement, that an assessment ought not to be laid upon certain property for the purpose, and that to do so would amount to an exaction from the property owner of a contribution he should not be obliged to make as a special assessment, the courts will interfere to prevent a consummation of the injustice. 25 R. C. L. 58, pp. 58 and 59. It is true that in fixing the amount of an assessment, or in determining if there would be a benefit to the property, the eminent domain commissioners should take into consideration the present as well as the future use to which the property is reasonably adaptable. *In re West Wheeler Street*, 97 Wash. 669, 167 Pac. 41. Yet, "the special and peculiar benefit which will legalize an assessment for the expense of a local improvement must be a present benefit immediately accruing from the construction of the work in question," and "land-owners cannot be assessed for intended benefits which may never be realized; mere speculative benefits are not, in reality, benefits." *State ex rel. Kellogg v. Elizabeth*, 40 N. J. Law 274; *State ex rel. New Jersey R. & T. Co. v. Elizabeth*, 8 Vroom (37 N. J. L.) 330; *In re Drainage Pequest River*, 10 Vroom (39 N. J. L.) 433; *Holdom v. Chicago*, 169 Ill. 109, 48 N. E. 164; *Hutt v. Chicago*, 132 Ill. 353, 23 N. E. 1010, 28 Cyc. (Municipal Corporations) p. 1129. It is contended by the city that this case presents no new questions to this court and that the propositions involved have been passed upon by us many times. On the contrary, an examination of the many cases of this court, cited by the respondent, shows no case where the situation was similar to this one. The case of *Hutt v. Chicago*, *supra*, very nearly meets the present situation. We adopt the views therein expressed, and for the sake of clearness quote rather fully, as follows:

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“The commissioners who were appointed to assess benefits to property owners made the assessment on the theory that a bridge would be constructed by the city across the river, and all the witnesses called by the city to sustain the assessment predicated their judgment of benefits to property upon the hypothesis that a bridge would be constructed across the river, as shown by their evidence. F. C. Vierling says ‘that the benefits that I have testified to here, all depend upon the erection of a bridge.’ E. C. Huling: ‘I base the benefits largely from the fact that a bridge would be built.’ John Wain bases his idea of benefits on the expectation of the street being opened all the way by a bridge. E. A. Cummings states that his testimony is based on the expectation that a bridge will be built across the river. John C. McCord states that in order to make the benefit appreciable there will have to be a bridge. William Kaspar says: ‘A bridge is necessary to this improvement. If there is no bridge there will be no benefit.’ The witnesses called by the objectors agree with those introduced on behalf of the city, that the improvement made by the proposed extension of the street will be of no benefit to the land owners assessed unless a bridge should be constructed across the river. Indeed, upon this point there was no substantial conflict or disagreement in the evidence. Not only in the admission of evidence, but in the instructions, the theory seemed to be adopted that the erection of a bridge in the future might be considered in estimating benefits. . . . The court also refused the following instruction: ‘The jury are instructed that benefits by the proposed improvement cannot be predicated upon the uncertainties of the future action of the city council in providing for the construction and building of a bridge at Canal street, but the benefits in this case must flow directly from the improvement proposed, without reference to such action of the city council in reference to the construction of said bridge.’ Also the following was refused: ‘If the jury believe, from the evidence, that the premises of the objectors will not be benefited by the proposed improvement unless a bridge should be constructed upon the line of

such improvement across the South Branch of the Chicago river at Canal street, then their verdict in this case should be for the objectors.' Other instructions of a similar character were refused. Indeed, it is apparent, from the record, that the case was presented to the jury, by the admission of evidence and in the instructions, upon the theory, that although the ordinance made no provision for a bridge across Chicago river, yet the fact that at some future time a bridge might be erected, might be taken into consideration in estimating the benefits which would be received by the land owners by the proposed improvement, and if this theory was erroneous, the judgment will have to be reversed. It is said, however, in the argument of counsel for the city, that the probable and natural consequences of an improvement ordered may be, and almost uniformly are, taken into consideration in determining the effect of the improvement on the values of private property. We find no fault with this position. Whatever may be the effect on the market value of property, if the act ordered to be done is a proper subject for consideration, all natural and probable results to flow from the improvement ordered may properly be considered in estimating benefits. But the trouble here is, no bridge has ever been ordered. The improvement ordered is the extension of a street, without any provision whatever being made for the erection of a bridge; and if it may be anticipated that at some future time a bridge will be erected by the city, and thus benefits flow to property owners, upon the same principle you may anticipate that some other improvement may be made on the line of the street which will also be of benefit to property owners, and assess that anticipated benefit against their property. We do not think the future action of the city of Chicago in ordering additional improvements can be regarded either as a probable or natural consequence to flow from the improvement ordered in this case. The ordinance here provides for the extension of a street. The extension requires the taking of land, and the benefits to be assessed must be confined to the improvement ordered. Section 24, of article 9, makes it the duty of the commis-

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sioners, in making the assessment, to apportion and assess the amount found to be of benefit to the property, upon the several lots, blocks and tracts of land, in the proportion in which they will be severally benefited by such improvement, provided no lot or tract shall be assessed at a greater amount than it will be actually benefited. We know of no principle under which it can be held that the language 'actually benefited' can refer to improvements not ordered, and that may never be ordered. The lands of appellants were assessed benefits derived from the erection of a bridge across the Chicago river which may never be built—a bridge that has not been ordered, and may never be ordered. We do not think such an assessment was contemplated by the statute."

In the case of *Dickson v. Racine*, 65 Wis. 306, 27 N. W. 58, written earlier than the *Hutt* case, a different result was reached. It was fully warranted, however, for the court said:

"The reason for opening the street was to make an approach to a bridge, the construction of which was contemplated by the city in the near future. It would seem absurd to say that such fact should have no effect in estimating benefits."

It is to be observed that, in the Illinois case, the street ran to the point where the bridge would be built, if ever, and in the Wisconsin case, to the place where the city contemplated building a bridge in the near future.

In the present case, the street in no way suggests a bridge or viaduct over navigable waters to appellants' property within the contemplation of the city in the near future, or at all.

There is abundant evidence in the record on the part of appellants to show the improvement will not specially benefit this property. But, wholly independent of that evidence, we are satisfied it cannot reach appel-

lants' property with any special benefits, and that the assessment rests upon a basis fundamentally wrong, the enforcement of which would result in oppression. We reach this conclusion as a matter of law. Appellants' property is still isolated from, and inaccessible to, the street, which could not be reached except by some means, estimated to cost a very large sum of money, over a navigable waterway subject to the control and pleasure of the Federal government, and thence on through property now held in private ownership.

Reversed, with directions to enter a judgment canceling all assessments against appellants' property.

HOLCOMB, C. J., PARKER, and TOLMAN, JJ., concur.

[No. 15728. Department Two. September 13, 1920.]

M. E. ZIOMKO, *Respondent*, v. PUGET SOUND ELECTRIC RAILWAY, *Appellant*.¹

STREET RAILROADS (19)—INJURY TO PERSON ON TRACKS—DUTY TO STOP, LOOK AND LISTEN. One entering upon the track of an interurban railway, the service of which was in the nature of a street car service, is not imperatively bound by the rule of "stop, look and listen," as when crossing or entering upon the tracks of a railway engaged in a through service where stops are made only at fixed stations.

SAME (30)—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether the driver of a vehicle upon a city street, struck by an interurban railway train, was guilty of contributory negligence was a question for the jury, where it being necessary to turn to the left onto the tracks to pass around an automobile parked at the curb, he looked back when two hundred feet away and saw no train approaching, and later, upon starting to turn his horse, he looked again and saw a train running backwards and almost upon him, too late to avoid being struck, and the operators of the train had notice of his danger in time to have stopped,

¹Reported in 192 Pac. 1009.

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and no bell was rung or warning given of the approach of the train.

APPEAL (413)—REVIEW—VERDICT. Where the verdict is supported by evidence in kind or quantity such as the nature of the case requires, so that the question is one of mere preponderance of the evidence, and the trial court has refused to set the verdict aside, the supreme court will not interfere, even though it may believe that the verdict is against the weight of the evidence.

APPEAL (406)—REVIEW—DISCRETION—NEW TRIAL. Whether the trial court does or does not express his views on the weight of the evidence upon denying a motion for a new trial will not be a distinguishing factor on appeal, but the inquiry will be limited to the question whether the verdict is supported by substantial evidence.

STREET RAILROADS (30) — CONTRIBUTORY NEGLIGENCE — EVIDENCE—QUESTION FOR JURY There was sufficient evidence to make a question for the jury upon an issue as to whether an interurban train could have been stopped in time to avoid striking a vehicle, notwithstanding plaintiff's negligence, where it appears that the train was moving backwards slowly and could have been and was stopped within a few feet; that the conductor saw plaintiff and noticed his inattention and he attempted to warn plaintiff by means of a mouth whistle, but had means within his reach for stopping the train almost instantly, and which he used after the accident.

TRIAL (101)—INSTRUCTIONS—REQUESTS. The refusal to give requested instructions which could have been properly given is not error, where their substance, so far as material, was embodied in the instructions given by the court.

TRIAL (97)—INSTRUCTIONS—MATTERS NOT SUSTAINED BY EVIDENCE. In an action for personal injuries, it is not error for the court to recite, in a statement of the issues, the substance of the allegations of the complaint and the items of damage alleged to have been suffered by reason of the injury, though certain of the items were unsupported by evidence, where no request was made to enumerate the items which no evidence had been offered to sustain.

DAMAGES (82)—PERSONAL INJURIES—EXCESSIVE VERDICT. In an action for personal injuries sustained by the driver of a vehicle struck by an interurban train, which plaintiff claimed caused a rupture and partially prevented him from performing his customary labor, a verdict for \$1,000 will not be held excessive, though it appears that the jury might well have found a lesser verdict.

Appeal from a judgment of the superior court for King county, Jurey, J., entered July 14, 1919, upon the

verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

James B. Howe and Hugh A. Tait, for appellant.

Edwin James Brown and John C. Bowen, for respondent.

FULLERTON, J.—This is an appeal from a judgment entered in favor of the respondent and against the appellant in an action brought to recover for personal injuries. As in all such cases, there are in the record certain facts which are not in dispute. The appellant owns and operates an interurban railway between the city of Seattle and the city of Renton. As the passenger trains of the appellant leave Seattle, they are operated in the usual way until they enter Main street in Renton. At this point the trains are switched onto a wye, where they are turned and brought back to the main track, and from thence they are backed to the terminal depot in Renton, a distance of some four hundred or five hundred feet. Main street is paved between the wye and the terminal depot. The street between these points extends north and south. The pavement is fifteen and five-tenths feet in width between the east rail of the appellant's railway track and its outer edge, at which place it terminates with the usual curb. The accident out of which the controversy arises happened shortly prior to six o'clock in the evening of September 11, 1916, at a place between the wye and the depot. The respondent at that time was riding in a two-wheeled cart drawn by a single horse.

The evidence as to the manner and cause of the accident is divergent. The respondent's version is that, at the time of the accident, he was driving from his home to the depot at Renton for the purpose of meet-

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ing his wife, whom he expected to arrive there at about that hour on one of the appellant's trains; that, when he reached Main street while on his way, he proceeded to drive at a walk on that part of the paved way lying to the east of the railway tracks; that he then saw a passenger train consisting of a motor coach and a trailer standing on the wye mentioned; that, as he proceeded on his way and was approaching the depot, he noticed an automobile parked on that side of the street between the curb and the railway tracks; that he was then some two hundred feet from the automobile, and realizing that he would have to turn onto the railway tracks to pass around it, looked back to see if a train was approaching and saw none; that, as he came near the automobile, he turned his horse to the left with the intention of passing around it, when he again looked for an approaching train and saw a train almost upon him; that he immediately stopped his horse and backed from the track, and, while he succeeded in clearing the horse from the front of the train, he was not so successful with the cart, which was struck by the car and one of its wheels crushed, the jolt throwing him to the pavement and causing the injuries for which he sued. His testimony further tended to show that the train as it approached was running backwards; that it was drifting, that is, moving without the application of power, and that no bell was rung, whistle blown, or gong sounded to give warning of its approach. His evidence also tended to show that the operators of the train had notice of his perilous situation in time to have stopped the train before striking him.

The appellant's version of the happening of the accident is that, as its train approached the respondent, he was driving on the side of the track between it and the curb, leaving ample room for the train to pass

him in the clear; that the train reached him before he had reached the parked automobile standing in the roadway; that the front end thereof passed both the cart and the horse before the cart was struck, and that the striking was caused because the horse became frightened, turned around and backed the cart into the moving train.

After the return of the verdict of the jury, and before judgment had been entered thereon, the appellant moved for judgment notwithstanding the verdict, and, in the alternative, for a new trial. The trial court denied the motions, and the first error assigned is the refusal of the court to set aside the verdict and enter a judgment for the appellant.

In support of this assignment the appellant contends that the respondent was guilty of contributory negligence, as matter of law. The contention is based on the fact that the respondent turned his horse upon the railway tracks, when he reached the parked automobile, before looking for an approaching train. Many cases from this court are called to our attention where somewhat similar acts on the part of pedestrians and vehicle drivers were held to be so, and argue with force that respondent's acts bring him within the rule. But we think it unnecessary to enter upon a review of the cases. Whether the court can say in a particular case the injured party was guilty of negligence, as matter of law, must depend upon the facts of the particular case. Precedents are usually but illustrative of the general principle, and are authoritative only where the facts are like or so far similar as to be indistinguishable. Here there was an element not found in the cited cases. It will be remembered that the respondent, while only a short distance from the place where he made the turn towards the tracks, and when he discovered that such a turn was going to be neces-

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sary, did look for an approaching train. It must be remembered, also, that the service in which the appellant's trains were engaged was in the nature of a street car service, and that in such a service the rule of stop, look and listen before entering upon its tracks is not imperatively necessary, as it is when crossing or entering upon the tracks of a railway engaged in a through service where stops are made only at fixed stations. The question whether the respondent was guilty of contributory negligence was, we think, a question on which reasonable minds might reasonably differ, and being so, it was a question for the jury, not the court.

Among the grounds upon which the motion for a new trial was based was the statutory ground of insufficiency of the evidence to justify the verdict, and it is urged that the trial court erred in refusing to grant a new trial on this ground. When the question of the sufficiency of the evidence to justify a verdict is presented to a trial court, that court is undoubtedly warranted, under our practice, in viewing the question from a two-fold aspect; that is to say, it may inquire whether the verdict is supported by evidence in kind or quantity such as the nature of the case requires, or it may inquire into the preponderance of the evidence, and grant or refuse to grant a new trial as its conclusions thereon dictate. While the rule is not the same in all jurisdictions, it is our rule that we will review a judgment founded on the verdict of a jury for insufficiency of the evidence only in a case of the first sort mentioned. If, for illustration, the trial court should enter a judgment upon the verdict of a jury founded on the testimony of one witness only where the law required two or required the witness to be corroborated, or should enter a judgment on a verdict founded on evidence of an oral contract where the

law required the contract to be in writing, plainly this court on appeal would reverse the judgment, even though the objection below was in the form of a motion for a new trial on the ground of insufficiency of the evidence to sustain the verdict. But where the verdict is supported by evidence sufficient in kind and quantity so that it is a question of mere preponderance of the evidence, and the trial court has refused to set the verdict aside, this court will not interfere, even though it may believe that the verdict is against the weight of the evidence. True, we have discarded the scintilla-of-evidence doctrine, and have held that evidence sufficient to support a verdict must be substantial—that is, of such a character that men of reasonable prudence and caution would act thereon in matters of their own concern—but this is not to say that the question is to be tested by weighing the evidence supporting the verdict with the evidence on the other side. Here, we are convinced, there was substantial evidence sufficient to support the verdict. Contrary to the appellant's contention, we cannot conclude that the respondent's account of the manner in which the accident happened is inherently improbable, or inconsistent with the physical facts shown, or that it is otherwise legally insufficient. The question, therefore, being one of mere preponderance of the evidence, we cannot interfere with the verdict without an abuse of power.

In passing upon the motion for a new trial, the trial judge, while he denied the motion, expressed the opinion that the verdict was contrary to his view of the weight of the evidence. The appellant argues that, having this view of the evidence, it was his imperative duty to grant a new trial, and that this court must hold that it was an abuse of discretion on his part not to do so. Our cases on this question, it must be con-

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fessed, are not consistent. The cases which most directly support the contention are *Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288, 47 Pac. 738; *Miller v. Dumon*, 24 Wash. 648, 64 Pac. 804; and *Johnson v. Domer*, 76 Wash. 677, 136 Pac. 1169. Cases to the contrary are: *Suell v. Jones*, 49 Wash. 582, 96 Pac. 4; *Columbia etc. Rafting Co. v. Hutchinson*, 56 Wash. 323, 105 Pac. 636; *Kincaid v. Walla Walla Valley Traction Co.*, 57 Wash. 334, 106 Pac. 918, 135 Am. St. 982; *Franev v. Seattle Taxicab Co.*, 80 Wash. 396, 141 Pac. 890; *Payzant v. Caudill*, 89 Wash. 250, 154 Pac. 170, and *Hendrickson v. Smith*, 111 Wash. 82, 189 Pac. 550. The reasons for the varying rules are stated in the cited cases and need not be repeated here. It is sufficient to say that we are now convinced that no distinction should be made in our inquiry, whether the court does or does not express his views on the weight of the evidence, but that we should in each instance, where the motion is denied, limit our inquiry to the question whether the verdict is supported by substantial evidence.

The court gave to the jury the following instruction:

"The court instructs the jury that the defendant is liable in this case if its servants failed to use ordinary care to prevent the injury of the plaintiff after they became aware of the danger to which he was exposed, or after they might have become aware thereof by the exercise of ordinary care, and by ordinary care is meant such care as would be ordinarily used by prudent persons performing a like service under similar circumstances; and the court further instructs the jury that if they believe from the evidence that defendant's conductor or motorman saw the plaintiff in time to avoid injury to him by using ordinary care, and that said conductor or motorman failed to use such care to prevent injury to the plaintiff, then the jury will find for the plaintiff."

It is argued that there is no evidence in the record to support the theory here suggested, and hence error to give the instruction. But we think there was evidence in the record from which the jury could well have found that the injury could have been avoided had the servants of the appellant exercised ordinary care after they discovered the respondent's danger. The train was moving slowly and could have been stopped, and was actually stopped after the accident, within a very few feet. The conductor was on the forward car in a place where he could see ahead of the train. He saw both the standing automobile and the respondent approaching it, and noticed the respondent's inattention to the approaching train. While the train was not equipped with any whistle, bell or gong within the conductor's reach, he was so much impressed with the situation that he attempted to warn the respondent by other means—a "mouth whistle"—but did not succeed in attracting the respondent's attention. The conductor had, however, within his reach means for stopping the train almost instantly, and this he used after the accident. Seemingly, in the light of these conditions, it is not too much to say that the jury were warranted in finding that the conductor did have an opportunity to avoid the accident by the exercise of ordinary care. We are clear that it was a question for the jury, and consequently cannot hold the instruction complained of erroneous.

It is complained, further, that the instruction is erroneous in that it entirely wipes out the defenses of contributory and concurrent negligence, and places no duty on the part of the respondent to exercise care for his own safety. But the rule is that:

"Contributory negligence of a party injured will not defeat his action, if the defendant or its servants might

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by reasonable care and prudence have discovered his peril in time to save him, and thus have avoided the consequences of the injured party's negligence. In such a case the plaintiff's alleged contributory negligence could not be said to be the direct and proximate cause of the accident, but the defendant's negligence would be the proximate cause and would thus render it liable." *Nellis on Street Railways* (2d ed.), § 462. *Locke v. Puget Sound Int. R. & P. Co.*, 100 Wash. 432, 171 Pac. 242, L. R. A. 1918 D 1119.

Complaint is made of the refusal of the court to give certain requested instructions. These we shall not review at length. Most, if not all of them, could have been properly given, but their substance, in so far as they were material, was embodied in the instructions actually given by the court. It is not the rule that every requested instruction which could be properly given must be given. If the jury are properly and fully instructed upon the controlling principles of law involved the rule is satisfied. Here the instructions were full and complete, and even if the requested instructions involved matters not within the given instructions, the refusal to give them was without prejudice, and hence without error.

In its charge to the jury the court, in stating the issues, recited the substance of the allegations of the complaint, and in the recital stated the items of damage the respondent alleged he had suffered by reason of his injury. Some of these items there was no evidence at all to substantiate, and others again were proven, if proven at all, only in part. The court was not requested and did not in its charge enumerate the items which no evidence had been offered to sustain, but by instructions more or less general left it for the jury to say which of the items the evidence tended to establish and to what extent they were established

thereby. This is assigned as error, but we cannot conclude that it is so. Under the practice in this state, when there is no evidence tending to support certain of the items going to make up the demand of a party, the court may properly so instruct the jury, whether requested to do so or not, and where a request therefor is made, it is probably its duty so to do. But the court need be no more diligent than is the party. In the absence of a request he may properly leave the questions to the jury. *Eggleston v. Seattle*, 33 Wash. 671, 74 Pac. 806; *Tribble v. Yakima Valley Transp. Co.*, 100 Wash. 589, 171 Pac. 544; *Zolawenski v. Aberdeen*, 72 Wash. 95, 129 Pac. 1090.

Finally, it is contended that the verdict is excessive. The amount of the recovery was \$1,000. After the accident the respondent was found to have a rupture, which he claimed was the result of the injury and which he testified partially incapacitated him from performing his ordinary and customary labor. The respondent introduced expert evidence to the effect that it was highly improbable that the injury could have caused the rupture, and introduced evidence of his neighbors and acquaintances to the effect that he had performed his ordinary labor much as he was wont to do prior to his injury. But the evidence on all these questions was contradictory, and while it appears to us that the jury might well have found a lesser verdict, we cannot say their finding is so far in excess of a just finding as to warrant interference therewith.

The judgment is affirmed.

HOLCOMB, C. J., MOUNT, TOLMAN, and BRIDGES, JJ., concur.

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[No. 15740. Department Two. September 13, 1920.]

H. R. CHARLTON *et al.*, Respondents, v.
ROBERT J. GRAHAM *et al.*, Appellants.¹

BOUNDARIES (13)—LOCATION OF LINES—EVIDENCE—SUFFICIENCY. Defendants' acquiescence in a boundary line along the line of an old fence a few feet from a correct survey, is sufficiently shown where it appears that such line corresponds in alignment with the boundary line between adjoining tracts; that a hedge planted by defendants to mark the boundary is in direct line therewith; that a cistern constructed on that tract by defendants would be on their neighbor's land if their present claims are correct; that a barn erected by them stands flush with such line and is without openings on that side, though it appears to be an appropriate place for openings, and there was no offer to explain why there should be a jog in the general division line in the neighboring tracts.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered May 15, 1919, in favor of the plaintiffs, in an action to quiet title, tried to the court. Affirmed.

A. H. Moehler and Hughes & Adams, for appellants.
Fred Kemp, for respondents.

FULLERTON, J.—The respondents, who were plaintiffs below, own a tract of orchard land containing approximately twenty acres, situated in Chelan county. The land is rectangular in shape, having a length double that of its width, the length extending east and west. The appellants own a ten-acre tract lying to the south of the respondents' tract and abutting onto the east half thereof. The respondents acquired their tract in 1904. At that time the land abutting upon the south for the length of the entire tract was in one ownership and was inclosed by a fence, the fence on the north of

¹Reported in 192 Pac. 936.

the tract marking, or supposedly marking, the dividing line between the two tracts. The appellants acquired their interest later and at different times; acquiring the east five acres thereof in 1910, and the west five acres in 1912. At this time the fence was in existence. This fence, due to the so-called "Herd Law" of 1911 (Laws of 1911, p. 93; Rem. Code, § 3172-1), was suffered to decay and become, in part at least, obliterated, so that, in 1918, but little, if any, vestiges of it remained. In the year last named, the appellants caused their tract to be surveyed by an engineer of Chelan county. This survey marked the north line of the tract as extending eleven and nine-tenths feet north of the line of the old fence as the respondents conceive it to be at the northeast corner, and four and one-tenth feet north of such line at the northwest corner. The appellants caused the land to be fenced in accordance with the survey, whereupon the respondents brought the present action to recover possession of the tract lying between the line of the old fence and the line of the new survey. The action resulted in a recovery on their part, and this appeal followed.

The respondents do not seriously dispute that the line as run by the engineer marks the true dividing line between the lands if protracted from the monuments as they presently exist, but rest their case on the claim that the fence mentioned was erected as the dividing line between the tracts, and that the line marked thereby has been recognized and acquiesced in as such dividing line for a period of time longer than the period of the statute of limitations. It was to these questions that the evidence was directed. The theory of each side is supported by a number of witnesses who testified to their recollection of the location of existing monuments. Their testimony is in conflict and cannot be

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reconciled on any possible theory. There are, however, matters and circumstances in the record apart from these uncertain recollections of the witnesses which, to our minds, throw the weight of the evidence to the side of the respondents. It appears that the line as contended for by the respondents corresponds in alignment with the boundary line between adjoining tracts lying both to the east and to the west of these tracts, which the line claimed by the appellants does not. The appellants planted a hedge to mark the south boundary of a small tract taken from the east side of the respondents' tract, which is in direct alignment with the line as claimed by the respondents. They also constructed a cistern on this tract which must be on their neighbor's land if their present claims are correct. They erected a barn on their ten-acre tract which stands flush with the line as claimed by the respondents, the eaves of the barn perhaps extending over the line. On the side of the barn next to the respondents there are no openings of any kind, yet it appears that this would have been an appropriate place for openings if the appellants thought then, as they now claim, that the barn is some ten feet south of the true line. True, the appellant Robert J. Graham offers explanations of some of these apparent inconsistencies, confessing that the hedge and cistern are on his neighbor's property, and saying that the barn was so constructed that a passageway might be left behind it, but he offers no explanation, and we find none elsewhere in the record, why, at this particular place, there is a jog in the general division line which marks the dividing line between these and the neighboring tracts.

But the questions are wholly questions of fact, and it would serve no useful purpose to pursue the inquiry. We cannot conclude that the trial judge found against

the weight of the evidence, and must therefore affirm the judgment. It is so ordered.

HOLCOMB, C. J., MOUNT, TOLMAN, and BRIDGES, JJ., concur.

[No. 15695. Department One. September 13, 1920.]

FRED HOYT, *Respondent*, v. HAINSWORTH MOTOR
COMPANY, *Appellant*.¹

SALES (105)—IMPLIED WARRANTY—SALE BY DEALER—LIABILITY. A dealer selling an automobile of a particular model, of which he was known not to be the manufacturer, is not liable to the purchaser upon an implied warranty against latent defects which he could not have discovered by ordinary inspection and tests; his duty being fulfilled when he delivered a car of the particular model contracted for.

SAME (105)—IMPLIED WARRANTY—QUESTION FOR JURY. As a general rule, an implied warranty is a presumption of fact and not of law, based upon the presumed intent of the parties, but where only one inference can be drawn from the undisputed facts, the question becomes one of law for the court.

Appeal from a judgment of the superior court for King county, Hall, J., entered July 9, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Roberts & Skeel and *L. B. Schwellenbach*, for appellant.

Revelle & Revelle (*Lucas C. Kells*, of counsel), for respondent.

MAIN, J.—This is an action for damages for breach of an alleged implied warranty in the sale of an automobile. The case was tried to the court and a jury, and resulted in a verdict for the plaintiff. The defendant, at appropriate times, challenged the suffi-

¹Reported in 192 Pac. 918.

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ciency of the evidence and moved for a directed verdict. After the verdict was returned, motions for judgment *non obstante veredicto* and for new trial were served and filed. Both of these motions were overruled and a judgment was entered upon the verdict, after the plaintiff had elected to accept a judgment for less than the amount for which the verdict was returned. The defendant appeals.

In stating the facts it will be assumed that the evidence of the respondent is true where there is conflict. The appellant is a corporation organized under the laws of the state of Washington, and is engaged in the business of selling automobiles at Seattle, Washington. On April 5, 1918, it sold to the respondent a new 1918 model, six cylinder, Oldsmobile. At the time the car was sold, the appellant had on the floor of its showroom this particular car. It did not, however, sell this car, but sold a car of the model described. The respondent saw and looked at the car that was in the showroom. A few days after the respondent had agreed to purchase a car, the appellant delivered to him the car which he looked at in the showroom and then told him that it was the same car. The respondent operated the car, after it was delivered to him, for a period of approximately eleven months. The car was defective, in that the pistons were a little too small for the cylinders. The car did not prove to be satisfactory, and after having operated it for the time mentioned, the present action was instituted for the purpose of recovering damages for a breach of implied warranty. It should be noted and kept in mind that the appellant was not the manufacturer of the automobile, but simply a dealer. The theory of the respondent that the sale was not of a particular car but of a particular model will be adopted.

The appellant claims that, since it was a dealer and not a manufacturer, in selling the car there was no implied warranty against latent defects. The respondent claims that, since he purchased not a specific car but a car of a particular model, even though the appellant were a dealer, there would be an implied warranty against latent defects such as ordinary inspection would not disclose. The defect in this car was latent and one that ordinary inspection would not disclose. The controlling question is whether, under the facts stated, the appellant as dealer is liable upon an implied warranty, there being no express warranty. Upon the question as to whether the dealer is liable upon an implied warranty for a latent defect in an article sold, the decisions of the various courts that have passed upon the question are divided. In some it is held that there is such an implied warranty. The majority of the courts, however, in this country hold that, in the case of the dealer as distinguished from the manufacturer, there is no such implied warranty. Williston on Sales, § 233. This court, in *Hurley-Mason Co. v. Stebbins, Walker & Spinning*, 79 Wash. 366, 140 Pac. 381, Ann. Cas. 1916 A 948, L. R. A. 1915 B 1131, has adopted the majority rule; that is, that a dealer does not impliedly warrant against defects not discoverable by ordinary inspection and tests. In the course of the opinion in that case it was said:

“According to the great weight of authority, there is a distinction between executory sales by manufacturers and executory sales by dealers; the rule being that, on a sale by a manufacturer, there is an implied warranty of fitness for the purpose intended, and of freedom from defects not discoverable by ordinary inspection and tests, while on a sale by a dealer, there is no such implication, in the absence of a specific warranty to that effect. All that is required of a dealer is an exercise of good faith and fair dealing.”

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Under the undisputed facts in the present case, there was a sale of an automobile of known manufacture. There is a rule collateral to that above referred to as the majority rule, to the effect that, where an article of known manufacture is made by one not the vendor and the vendee knows this fact, there is no implied warranty by the dealer against latent defects. This rule, as stated by the circuit court of appeals for the eighth circuit in *Reynolds v. General Electric Co.*, 141 Fed. 551, is as follows:

“But where such a purchaser buys of a dealer a definite machine of known manufacture, which has been, or is to be, made by a builder who is not the vendor, and the vendee knows this fact, there is no implied warranty by the dealer, either against latent defects or that the machine or article will be suitable for the purposes for which such articles are commonly used, because the purchaser has the same knowledge and means of knowledge of these subjects as has the dealer. The vendee knows that they both rely on the character and reputation of the manufacturer. (Citing authorities.)”

This is a natural corollary to the majority rule, or that of nonliability on an implied warranty by a dealer. There is no escaping the conclusion that the appellant in this case sold to the respondent an article of known manufacture of which the vendor or dealer was not the builder. The case comes squarely within this rule. The appellant relies upon the rule that, where goods of some specific kind are ordered of the manufacturer or dealer, which the buyer has neither inspected nor selected, there is an implied warranty that the article delivered shall be of fair average quality or goodness according to its kind, and free from remarkable defects. Mechem on Sales, § 1340. But, under this rule, as pointed out by the same author in § 1345, before a

dealer can be held liable on an implied warranty the conditions stated in the rule must be present.

“ . . . namely, an executory agreement by the dealer to supply an article not yet ascertained, but left to be determined by him according to his own judgment in view of the purpose to be subserved by it as communicated to him by the buyer.”

This case, however, does not come within this rule. Nothing was left to be determined according to the judgment of the appellant, and his duty was fulfilled when he delivered a car of the particular model contracted for.

To review the many authorities cited in the respondent's brief and distinguish them *seriatim* would extend this opinion to an unreasonable length and serve no useful purpose. Generally speaking, it may be said that the cases cited fall into one of the four following classes: First, they are cases that have adopted what is called the minority rule, and not the rule of the majority as adopted in the *Hurley-Mason* case. Such cases would not be persuasive in this jurisdiction so long as the rule of the case referred to stands. Second, cases where there is an express warranty. Third, cases where the purchaser desires an article for a specific purpose and communicates this purpose to the dealer and the latter undertakes to furnish an article suitable for the purpose specified. The case of *Hausken v. Hodson-Feenaughty Co.*, 109 Wash. 606, 187 Pac. 319, is within this class. Fourth, where goods of some specific kind are ordered of the manufacturer or dealer which the buyer has neither inspected nor selected. As already pointed out, the present case does not fall within this rule.

The respondent's contention that an implied warranty is an inference of fact, and therefore a question

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for the jury to determine, has not been overlooked. It may be admitted that, as a general rule, an implied warranty is a presumption of fact and not of law, based upon the presumed intent of the parties. If the facts were such that more than one inference might reasonably be drawn therefrom, it will be assumed that it would be the province of the jury to determine the proper inference. Where, however, only one inference can be drawn from the undisputed facts, there is no function for the jury to perform, and the question becomes in effect one of law. The automobile in question being one of known manufacture of which the appellant as dealer was not the builder, under the majority rule as adopted in the *Hurley-Mason* case, and the corollary thereto as stated in the *Reynolds* case, there can be no recovery in this case. This being decisive of the action, it is unnecessary to review the other questions presented and disclosed in the briefs. To hold otherwise than that indicated would be to apply a different rule in this state to the sale of automobiles by a dealer than is applied when other articles are so sold. We see no reason why the sale of an automobile by a dealer should not be controlled by the general rule. The purchaser can protect himself by exacting from the dealer an express warranty.

The judgment will be reversed, and the cause remanded with directions to the superior court to dismiss the action.

HOLCOMB, C. J., MITCHELL, PARKER, and TOLMAN, JJ.,
concur.

[No. 15899. *En Banc*. September 13, 1920.]

JOHN W. LANGDON *et al.*, *Appellants*, v. THE CITY OF
WALLA WALLA *et al.*, *Respondents*.¹

EMINENT DOMAIN (8)—BY CITIES—POWERS—PROPERTY IN OTHER STATE—WATER SUPPLY—STATUTES. Under Rem. Code, § 7612 and § 8005 granting cities power to acquire waterworks within or without the corporate limits, the city of Walla Walla has power to acquire and own property situated in the state of Oregon, upon consent of that state, for the purpose of making extensions and betterments to its waterworks system; and the exercise of such power is not the assumption of extra-territorial jurisdiction over property situated in another state (MAIN, MITCHELL, MACKINTOSH, and BRIDGES, JJ., dissent).

SAME (8, 11)—POWERS OF CITY—PROPERTY IN OTHER STATE—STATUTES—VALIDITY. Laws of Oregon, ch. 182, p. 256, enacted February 23, 1909, granting to municipal corporations of any state adjoining the state of Oregon power to purchase or condemn lands within the state of Oregon for the purpose of obtaining a water supply, which was followed in all particulars by the enactment by this state on the following day of an act granting reciprocal powers to the cities of the state of Oregon, is not unconstitutional in that it permits the right to condemn property of that state for a public use for the benefit of the people of another state, but will be held a valid exercise of the state's power of eminent domain to further the public interests of a sister state, in return for reciprocal privileges to the cities of Oregon (MAIN, MITCHELL, MACKINTOSH, and BRIDGES, JJ., dissent).

MUNICIPAL CORPORATIONS (525)—PUBLIC UTILITIES—BONDS—SALE AT DISCOUNT—STATUTES. In an action to enjoin the issuance and sale of municipal bonds for a public improvement, the mere allegation in the complaint that the city authorities are threatening to sell "a part only of said bonds at par, and a part thereof at 95 cents on the dollar," in violation of a provision of the ordinance that "none of said bonds shall be sold or issued . . . at less than par value and accrued interest," does not warrant the court in interfering; since it will be presumed that the city authorities are not contemplating selling any of the bonds at such a discount below par that the total amount of such discount and interest will result in paying more than the maximum rate allowed by the statutes and ordinance.

¹Reported in 193 Pac. 1.

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Syllabus.

SAME (523)—BONDS—ISSUANCE—SUBMISSION TO VOTERS—RATIFICATION OF PLAN. An election submitting to the voters of a city a proposed improvement and the issuance of bonds therefor, concluding with the words, "and shall the ordinance be ratified" is not invalid as amounting to the ratification of the ordinance rather than a ratification of the proposition submitted, since the manifest intent expressed by the ordinance and ballot was that the ordinance should be deemed in full force and effect, in so far as it provided for the submission of the proposition.

SAME (524)—SUBMISSION TO VOTERS—NOTICE OF ELECTION—PUBLICATION. Rem. Code, § 7670-22, providing that none but emergent ordinances shall go into effect before thirty days from the time of final passage, and granting the right of referendum during such period, does not prevent the going into effect, upon its passage and publication, of an ordinance submitting to the voters a proposition of making betterments and extensions to the city's water works system, thereby, in effect, providing within itself for a referendum; hence the publication of the election notice less than thirty days following the passage of the ordinance was not premature.

SAME (124)—SUBMISSION TO VOTERS—PLAN OR SYSTEM ADOPTED. An ordinance sufficiently complies with Rem. Code, § 8006, in submitting to the voters the plan or system proposed for a public improvement, where it specifies the same in such general terms as will fairly inform the voters of the general nature and extent of the proposed improvement.

SAME (523) — BONDS — SUBMISSION TO VOTERS — SEPARATE PURPOSES. An election submitting to the voters the proposition of making betterments and extensions to the city's water works system which includes the construction of a large reservoir in addition to the extensions, additions, pipe lines, etc., is not invalid as submitting other than a single proposition to the voters, since the things proposed to be done all relate to the improvement of the system as a whole.

SAME (486, 519)—BONDS—LIMITATION OF INDEBTEDNESS—CONSTITUTIONAL PROVISIONS. The issuance of bonds in the sum of \$500,000, for the making of extensions and betterments to a city's water works system does not increase the city's total indebtedness beyond the ten per cent of the taxable property in such city, as allowed by Const., art. 8, § 6, for all city purposes, where the assessed valuation of the taxable property within the city is \$9,982,955, and its present indebtedness amounts to only \$390,457.

SAME. Such \$500,000 indebtedness is not limited to the five per cent limitation of indebtedness allowed for supplying the city "with water, artificial light and sewers," but is valid if the total indebted-

ness of the city is not increased thereby to more than ten per cent of the taxable property, as provided by Const., art. 8, § 6, for all city purposes.

SAME. Under Const., art. 8, § 6, allowing a city to become indebted in an amount not exceeding five per cent of the taxable property in such city, for the purpose of supplying the city "with water, artificial light and sewers," a city may exhaust such debt-incurring power in supplying the city with water alone; since the language enumerating the purposes will be regarded as reading in the disjunctive, as though it were "water, artificial light or sewers."

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered April 23, 1920, in favor of the defendants, in an action for an injunction, tried to the court. Affirmed.

Evans & Watson, for appellants.

H. B. Noland, for respondents.

PARKER, J.—The plaintiffs seek an injunction preventing the city of Walla Walla and its officers from making certain proposed additions, betterments and extensions to its existing water works system and issuing and disposing of general indebtedness bonds of the city to pay the cost thereof. A hearing upon the merits in the superior court for Walla Walla county resulted in a judgment denying to the plaintiffs the relief prayed for, from which they have appealed to this court.

Walla Walla is a city of the second class under the laws of this state and has a commission form of government. It is situated about five miles north of the southern boundary of this state, which is also the northern boundary of the state of Oregon. Its present water supply comes from Mill creek, the source of which is east of the city, in this state; from whence it flows southerly across the state line into Oregon, thence for a distance of some four miles southerly, westerly

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and northwesterly through Umatilla county of that state, to and across the state line back into this state, and thence in a northwesterly direction to and through the city of Walla Walla. The city already possesses some property rights enjoyed by it in the maintenance of its present water system, situated upon Mill creek, in Oregon. It seems to be one of the conditions of our problem, and we shall assume, for argument's sake, as we proceed, that the proposed additions, betterments and extensions of the city's water works system are such that, in order to successfully make them, it will be necessary for the city to acquire additional property rights upon and adjacent to Mill creek in Oregon, by the exercise of the eminent domain power of that state; and if the city has not the power to exercise the eminent domain power of that state, the betterments and extensions to its water works system as proposed cannot be made and the city and its officers should be enjoined from issuing or disposing of the bonds here in question to that end.

On November 11, 1919, the city commission, acting to pay the cost thereof, to the amount of \$500,000, or the acquisition of public utilities and the making of additions, betterments and extensions thereto, Rem. Code, § 8005 *et seq.*, passed an ordinance providing for the submission to the voters of the city the proposition of making additions, and betterments and extensions to its water works system, and the issuance and disposition of the city's general indebtedness bonds to pay the cost thereof, to the amount of \$500,000, or so much thereof as may be necessary for that purpose. The proposition as set forth in the ordinance is, in substance, that there shall be constructed a 24,000,000 gallon concrete reservoir, specifying its approximate location, which shall be connected with the pipe lines

of the city's distributing system; that a new diversion dam and intake be constructed on Mill creek, within the Wenaha National Forest Reserve in Umatilla county, Oregon, to be connected by pipe lines with the city's existing system; that the city acquire title to, or permanent control over, such lands in Umatilla county, Oregon, as may be necessary to make the proposed additions, betterments and extensions, and to preserve the purity of the water to be used; that

"The city of Walla Walla, either by purchase or condemnation, shall acquire in the manner provided by law, all necessary lands, rights of way, waters, water rights, easements, privileges and property necessary for the construction, convenient use, maintenance and operation of the additions, betterments and extensions herein mentioned, and shall construct, own, control, operate and maintain said additions, betterments and extensions as a part of its municipally owned water works system";

and that the costs of the proposed additions, betterments and extensions, including the acquisition and control of property necessary therefor, all of which is declared to be of an estimated cost of \$500,000, shall be paid for by the issuance and disposition of the city's general indebtedness bonds in that sum, or so much thereof as may be necessary; specifying the times within which the several specified classes of bonds shall mature, providing for such levying of taxes each year as may be necessary to pay the principal and interest of the indebtedness so evidenced, and pledging the faith and resources of the city to the payment of the bonds and interest thereon as a general indebtedness of the city. An election was accordingly held, after due notice thereof, submitting the proposition to the voters of the city, which resulted in its adoption by more than three-fifths of the qualified voters of the city voting at the election, as provided

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by § 8006, Rem. Code. Other facts will be noticed as may become necessary in our discussion of the several questions presented.

The most elaborately argued, and evidently regarded by counsel for appellants as the soundest ground of contention made by them, is stated in their brief as follows:

“The trial court erred in not holding said ordinance and all proceedings thereunder invalid for the reason that the city is without any right, power or authority to purchase or acquire by eminent domain any property or property rights, or to expend money in, or become indebted for, the construction or maintenance of the proposed extension of its water works system in Umatilla county, Oregon, or within the Wenaha National Forest Reserve.”

We first inquire, Has the city of Walla Walla the power, in so far as its own organic law is concerned, to acquire property of the nature and for the purpose here in question which is situated in the state of Oregon—that is, do the laws of this state grant to the city the privilege of acquiring such property in another state? In the enumeration of powers of cities of the second class, to which class Walla Walla belongs, we read in § 7612, Rem. Code, as follows:

“44. Waterworks: To provide for the erection, purchase or otherwise acquiring of waterworks *within or without the corporate limits of the city* to supply such city and its inhabitants with water, . . .”

And in § 8005, Rem. Code, the first section of the act relating to the acquiring of public utilities by cities, under which the city is proceeding, we read:

“Any incorporated city or town within the state be, and hereby is, authorized to construct, condemn and purchase; purchase, acquire, add to, maintain, conduct and operate waterworks, *within or without its limits*, . . .”

In so far as this constitutes authority for the city acquiring and owning property of the nature here in question outside of the city's corporate limits, it manifestly is authority for the city acquiring and owning property so situated, in its proprietary, and not in its governmental, capacity; that is, authority to acquire and own such property just as any corporation, other than municipal, could exercise ownership over public utility property. We find nothing in the organic law of our cities suggesting that their governmental authority shall extend beyond their corporate limits. Now, since a city's ownership and dominion over such property is of this nature, and the city is unqualifiedly authorized to acquire such property "*without*" as well as "*within*" its corporate limits, we are quite unable to see that the power of acquiring and owning such property is limited to property within our own state. The suggestion that to allow a city of this state to acquire property of the nature here in question in another state would, in effect, be an assumption of extra-territorial jurisdiction, we think, is wholly without force, in view of the fact that the city's ownership of such property situated outside its own territorial limits, whether within or without this state, is only the ownership and control over such property in the city's proprietary capacity. Such ownership does not, to our minds, suggest an assumption of extra-territorial governmental jurisdiction, either on the part of the state of Washington or of its cities, over property situated in another state. If the laws of Oregon permit the city of Walla Walla to acquire and own within that state property of the nature and for the use here in question, which, as we think, will presently appear, though that is apart from this particular inquiry, manifestly we must presume that the courts of Oregon

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will protect the property rights the city so permissively acquires in that state, the same as they will protect the property rights of any other similar ownership of property therein, and that, should such protection be refused by the Oregon courts, the courts of the United States will afford such protection. The state of Oregon may, of course, if it so choose, withhold from the cities of this state the right to acquire property in that state, just as it may withhold such right from any other foreign corporation; but that does not argue that this state has not given to its cities such power of acquisition and ownership of property as will enable them to acquire property in Oregon by consent of that state. This, we think, is as far as we need go in our inquiry touching the power of the city of Walla Walla under its organic law; that is, under the laws of this state which brought the city into being and gave to it the powers specified in the statutes above quoted from. We conclude, then, that the city of Walla Walla does possess, in its proprietary capacity, the power to acquire and own in the state of Oregon, so far as it may be necessary for it to acquire such power from the state of Washington. Whether or not, and to what extent, the city may be able to exercise such power in the state of Oregon is, of course, a question to be decided under the laws and constitution of that state. There has come to our notice but one decision which we regard as calling for particular notice, as tending to show the law to be otherwise. That is the decision of the Wisconsin court in *Becker v. LaCrosse*, 99 Wis. 414, 75 N. W. 84, 40 L. R. A. 829. The city of LaCrosse, in the state of Wisconsin, on the east bank of the Mississippi river, was authorized by the legislature of that state to construct a bridge across that river to the Minnesota shore. The

city not only constructed the bridge, but constructed a highway, two and one-half miles long, beyond the end of the bridge in Minnesota. This seems to have been done by consent of the state of Minnesota; but manifestly without the consent, express or implied, of the state of Wisconsin, since it does not appear that the city could have gone outside its limits and maintained a highway even in Wisconsin. In a suit against the city by one injured as the result of a defect in the highway so maintained by it in Minnesota, the Wisconsin court held that recovery could not be had because the state of Wisconsin had not granted to the city the power to construct and maintain such highway in Minnesota, and that in so doing the city was wholly without authority, so the city authorities could not render it liable for any act committed in the construction or maintenance of the highway in Minnesota. We think that is not this situation.

We next inquire, Has the city of Walla Walla the right and power, under the laws of Oregon, to acquire by purchase, and also by condemnation, in the exercise of the power of eminent domain of that state, the property rights here in question which the city proposes to acquire in Umatilla county, in that state, outside of the Wenaha National Forest Reserve? We pass to the question of the city's right to acquire such property by condemnation, since, as a matter of course, if the city can acquire such property by condemnation, under the laws of that state, it can do so by purchase. On February 23, 1909, there was enacted by the Legislative Assembly of the state of Oregon, a law reading as follows:

“Section 1. That any municipal corporation of any state adjoining the State of Oregon may acquire title to any land or water right within the State of Oregon, by purchase or condemnation, which lies within any

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watershed from which said municipal (corporation) obtains or desires to obtain its water supply.

"Section 2. That any person who shall place or cause to be placed within any watershed from which any city or municipal corporation of any adjoining state obtains its water supply, any substance which either by itself or in connection with other matter will corrupt, pollute or impair the quality of said water supply, or the owner of any dead animal who shall knowingly leave or cause to be left the carcass or any portion thereof within any such watershed in such condition as to in any way corrupt or pollute such water supply, shall be deemed guilty of misdemeanor and upon conviction shall be punished by fine in any sum not exceeding five hundred dollars." Laws of Oregon, Ch. 182, p. 256.

On the following day, February 24, 1909, there was enacted by the legislature of the state of Washington, a law in exactly the same language, excepting that the words "State of Washington" appear in the first section thereof, as the words "State of Oregon" appear in the first section of the Oregon law. That the city of Walla Walla possesses power to acquire property of the nature and for the use here in question, situated in this state, by the exercise of its right of eminent domain, is conceded; so the express language of the law of Oregon, above quoted, renders it plain that nothing stands in the way of the city of Walla Walla acquiring property as contemplated in Oregon, by the exercise of the power of eminent domain of that state, except it be that the Oregon law is in violation of some provision of the constitution of that state. So far as we are advised, the courts of that state have never been called upon to determine the question of the constitutionality of that law, and we are therefore placed in the position of being called upon to determine that question without the aid of any expression of opinion

thereon from the courts of Oregon. We cannot escape this delicate task, because if the city of Walla Walla cannot exercise the power of eminent domain in that state which its law in terms grants to our cities, the city of Walla Walla cannot lawfully proceed in the making of the proposed additions, betterments, and extensions to its water works system. We shall assume that the question of public use is a judicial question in Oregon, as it is in our state, and that such question has been and will be decided by the courts of that state guided by the same considerations as control us; and we shall, therefore, be governed in our conclusions as we would be were this a case of an Oregon city seeking in this state what Walla Walla is seeking in Oregon.

It needs no argument to demonstrate that the purpose for which this property is sought to be acquired is, speaking generally, a public use. But counsel contend, and strenuously argue, that the public use which is necessary to support the exercise of the right of eminent domain in the acquisition of this property is a public use for the benefit of the people of Oregon, and that, since the acquisition of the property here in question lying within that state is only for the purpose of enabling the city to take and convey water from that state into this state for use wholly within this state, it is not such a use as will support the exercise by the city of Walla Walla of the eminent domain power of Oregon. Many general expressions may be found in the decisions of the courts of this country which seem to lend support to this contention. For instance, in *Kohl v. United States*, 91 U. S. 367, Justice Strong said:

“The proper view of the law of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and

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not for those of another. Beyond that, there exists no necessity, which alone is the foundation of the right."

This language is used, however, only in an argumentative way, in the consideration of a controversy in which there was not involved the question of the power of a state, by express legislative enactment, to exercise or authorize the exercising of its power of eminent domain in the acquisition or damaging of property for a public use primarily in a sister state. We think that expressions of this import made in the decisions of the courts are all to be found in cases wherein there was not involved the power of a state, by express legislative enactment, to use or authorize the use of its eminent domain power for a public use in another state. The decision in *Tromley v. Humphrey*, 23 Mich. 471, seems to come nearest to the situation here involved as lending support to the contentions made in appellants' behalf. The legislature of that state passed an act purporting to authorize the exercise of the eminent domain power of that state in its own courts to acquire a site for a lighthouse, and when so acquired to convey the same to the United States. In the court's opinion, observations are made of the same general import as above quoted from the *Kohl* decision. It was held that the state's power of eminent domain could not be so exercised, because it was, in effect, the exercising of the power in the acquisition of the property for a public use, which was not a use for the people of Michigan, but for the United States. That decision, however, can hardly be regarded as authority here as to the exercising of a state's power of eminent domain for a Federal use, in view of the early decision of this court in *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A.

817, wherein this court sanctioned the exercise of the state's power of eminent domain by King county in acquiring the necessary property rights to render possible the construction of the Lake Washington canal.

In *Grover Irrigation etc. Co. v. Lovella Ditch etc. Co.*, 21 Wyo. 204, 131 Pac. 43, is to be found what appears to us as one of the most exhaustive and learned discussions to be found in the books touching the exercise of the power of eminent domain in the acquisition of property rights in one state primarily for public use in another state. That case involved the attempted condemnation of a small tract of land for a headgate and intake of water a short distance north of the southern boundary of Wyoming, which is also the north boundary of Colorado, for irrigation use in Colorado. It was held, we think correctly, that the right of eminent domain of the state of Wyoming could not be exercised by the corporation seeking to thus exercise it, because there was no law of Wyoming authorizing the exercise of the state's right of eminent domain to promote a public use beyond the state's territorial limits. Near the conclusion of his exhaustive opinion, Justice Potter, speaking for the court, uses language which we understand as plainly indicating that the court refrains from deciding what the legislative power of the state may be touching the granting of the exercise of the state's power of eminent domain in the acquisition of property within the state for a public use in a sister state. We might notice many other decisions of the courts wherein can be found general expressions seeming to lend support to the contention of counsel for appellants. We think, however, that they will all be found to come no nearer a solution of our present problem than those already noticed.

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We now notice two decisions of state courts of eminence, which are so nearly parallel in their facts with the facts of this controversy that we think they are all but conclusive in the support they lend to the contentions here made in the city's behalf. In *In re Townsend*, 39 N. Y. (App. Div.) 171, the court of appeals of that state had under consideration the question of the exercise of the power of eminent domain of that state by a New Jersey canal company for the purpose of acquiring property rights in New York to aid in the maintenance of the company's canal, the whole of which was within the state of New Jersey. The eminent domain power of New York was sought to be exercised in pursuance of a statute of that state expressly authorizing the canal company to thereby acquire the necessary property rights in New York. The course of the canal ran from the Delaware river easterly across the northern part of New Jersey to tide water on the Passaic river, and constituted, with the waters of the Passaic river, a water highway across New Jersey to a point opposite the city of New York. The canal passed near the southerly end of a lake called "Long Pond," which lies partly in New York and partly in New Jersey. It was sought by the canal company to dam the southerly end of the lake so as to raise the water several feet, creating a reservoir to aid in the maintenance of the canal. This would result in the overflowing of private property along the northerly shores of the lake in the state of New York; and it was to acquire the right to so damage that property that eminent domain proceedings were prosecuted by the canal company in the courts of the state of New York, as it was expressly authorized so to do by the New York statute. The argument was made that such taking and damaging of property in New York did not

constitute the taking or damaging of such property for a public use of the people of New York, and therefore there was no warrant for the exercise of the power of eminent domain of the state of New York. In disposing of the case, Judge Woodruff, speaking for the court of appeals, said:

“If any question, discussed on this appeal, relating to the power of the legislature to authorize the respondents to take lands in this State for their reservoir, remains, it is whether this court can say that taking lands along the shore of Long pond, in the sense in which it was authorized by the act, viz., by flooding it in making such pond a reservoir for supplying the respondent’s canal, is taking private property for a public use.

“The respondents’ canal runs from the Delaware river, in New Jersey, to the Hudson river, at a point opposite our chief commercial city, New York. In its course it passes near our southern border, and for its supply a reservoir is needed, which requires the basin of Long pond, a portion of which is within our state, and the employment of which, by raising the water, appropriates some lands around its shore.

“If the canal itself came within our limits, it would not be doubtful, according to the views I have expressed, that the legislature could authorize its construction, and the taking of lands for the purpose; and, in that case, the construction of the reservoir for its supply, would be no less within the power.

“It does not follow, because the canal is outside the State limits, that its construction and maintenance are not for a public use, within the meaning of our Constitution. If it were within our limits, what are the public benefits to result from its construction? Not merely that our citizens may use it for transportation or travel. Providing transportation to market and facilitating intercommunication are some of the public purposes of such improvements; but communication between our chief cities and the productive regions which lie outside our State, and intercourse with those

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who dwell there, are as truly objects of public interest and advantage as between two sections of the State itself. Besides, the court cannot say that the Morris canal does not run within the reach of a portion of our own citizens, and directly aid them in the conduct of their intercourse with our eastern border, or the counties along the Hudson river to which it runs.

"The work promoted belongs to a class long recognized as public in its character; and I think it was for the legislature to say whether the benefit to result to our own citizens, and facilitating internal commerce for the promotion of our trade or otherwise, were sufficient to call for the exercise of the power to take private property therefor; and that the decision of the legislature on that point is not subject to review in this court."

It seems to us that all that was said in that decision can be as truthfully said, by appropriate paraphrasing, with regard to the mutual relationship and interests of this state and the state of Oregon in what is here proposed to be done, especially in view of the reciprocal rights granted to the cities of each state in the other state by these laws passed manifestly as reciprocal measures. In *Reddall v. Bryan*, 14 Md. 444, we also have a case which involved an express legislative grant by the legislature of Maryland to the government of the United States to exercise the right of eminent domain of the state of Maryland in the courts of that state in the acquisition of property rights within that state necessary to the furnishing of the city of Washington with water. The constitution of Maryland, like our own, permits the exercise of the state's rights of eminent domain only in taking or damaging property for the public use, and answering the argument that the taking of the property in that state for the purpose of furnishing the city of Washington with water was not taking it for a public use of the people of that state, and therefore not a public use within the mean-

ing of the state constitution, Justice Bartol, speaking for the court, referring to the "public use" mentioned in the state constitution, said:

"We regard the words of this section as mandatory, both as to the *use* for which private property may be taken, and the previous payment or tender of compensation therefor. It can be taken only for *public use*. But we cannot adopt the narrow and restricted construction of these words contended for by the appellant's counsel. They do not mean merely a use of the government of Maryland, and the State of Maryland, and its inhabitants as such, but in our opinion, they embrace within their scope, a use of the government of the United States.

"The supplying of the capital of the United States with water, essential for the preservation of the public buildings and public records, and alike essential for the use of the officers of the government, who are compelled to reside there, permanently or temporarily, is surely a *public use*, within the meaning of our state Constitution.

"Maryland, as one of the States of the Union, and, in some sense, an integral part of the great public, interested in and constituting a part of the general government, has, by the provision of her Constitution, which we have cited, conferred upon the Legislature the power of passing the Act of 1853, and we should have no difficulty in pronouncing that Act valid and constitutional, even if there were no other or different relations subsisting between the State of Maryland and the seat of government of the United States, than those which belong to every other State. But, as justly remarked by the judge of the Circuit Court, in his opinion in the case of *United States vs. Anderson*, 'By the act of 1791, in pursuance of the 8th Sec. of the 1st Article of the Constitution of the United States, the state ceded jurisdiction over its portion of the ten miles square, for certain purposes. . . . The state never intended to abandon all interest in the District.'

"The relation, therefore, between the District of Columbia, composed of territory ceded by Maryland

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for certain purposes only, and the state of whose soil it forms a part, is more intimate and close than that which it bears to any other state.

"We conclude, therefore, that the expropriation of lands in Maryland, for the purpose of supplying the city of Washington with water, may be regarded, in every sense, as *taking it for public use*.

"We are also of the opinion that the government of the United States possesses the power, under the Constitution, to construct such aqueduct, drawing its supply of water, if necessary, from within the limits of Maryland, and using and occupying lands for that purpose in Maryland, by the permission and consent of the State."

It is true that the learned writer of that opinion does observe some distinction between the relationship existing between the state of Maryland and the District of Columbia, and that which exists between one state and another; but his language in the opinion is convincing that the decision would have been the same had they regarded the relationship between the District of Columbia and Maryland the same as that existing between two states. As already noticed, we have not overlooked the provisions of Const., art. I, § 16, which in express terms makes the question of public use a judicial one in this state, to be "determined as such without regard to legislative assertion that the use is public," and we are assuming, for argument's sake, that the Oregon constitution is the same; but it seems to us that this is not so much a question of public use; for manifestly the taking of property rights by the city of Walla Walla, as contemplated, would be taking them for a public use, speaking generally; but it is more a question of whether or not such public use is one for which the legislature of the state may, *by express enactment*, authorize property to be taken by the exercise of the state's power of eminent

domain. This phase of the question, we think, partakes of a legislative as well as of a judicial nature, as it seems to have been regarded by the New York and Maryland courts in the decisions above quoted from. This is not a question of taking from the state of Oregon any of its sovereign powers or rights; but is only a question of that state voluntarily exercising, or rather permitting the exercising of, its sovereign power of eminent domain to further the public interest of her sister state of Washington, in return for which her people not only receive at least some use of a public nature not materially different from that use received by the states of New York and Maryland in the cases above noticed, but also in return for which her own cities are accorded like property privileges in the state of Washington. We are quite convinced that we would not hold our law granting this privilege to the cities of Oregon unconstitutional, were the question presented to us by a reversal of the situation here involved; and shall therefore presume that the Oregon courts will not hold the law of that state here in question as violative of its constitution, but will give the law full force and effect in aid of the improvements proposed to be made by the city of Walla Walla.

The suggestion that the city of Walla Walla might be impeded because it in no event can exercise the right of eminent domain within the limits of the Wenaha National Forest Reserve, seems to be answered by the fact that the city has already acquired all necessary rights within the limits of that reservation. If not, it seems plain that it will be enabled to do so under the Act of Congress of February 1, 1905, which makes express provision for the acquiring of such rights by the city. 33 U. S. Stat. at L., part 1. p. 628.

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It is contended by counsel for appellants that the trial court erred in refusing to enjoin the city authorities from disposing of the bonds at a price below par. The allegations of the complaint as to this threat are that the city authorities are threatening to sell "a part only of said bonds at par, and a part thereof at ninety-five cents on the dollar." This is all the information that the record furnishes us as to just what the threat of the city officials is in this regard. It is not claimed, and we shall therefore not assume, that such a sale of a part of the bonds, resulting in the total amount of the discount upon the bonds so sold, added to the total amount of the interest at the rate specified therein, will exceed the amount of interest upon the bonds so sold computed at the maximum rate allowed by the statute upon such bonds; or will exceed the amount of interest upon the bonds so sold computed at the maximum rate specified in the ordinance submitting the proposition to the voters of the city. This contention is rested upon a literal reading of the following provision of the ordinance submitting the proposition to the voters: "None of said bonds shall be sold or issued in payment of the cost of said improvements at less than par value and accrued interest." Should we look no further, this would seem to call for the conclusion that appellants' counsel here contend for, assuming, for argument's sake, that the question is one that is contemplated by the statute shall be submitted to the voters, and their decision become binding upon the city's authorities. But the ordinance also provides that the sale of the bonds "shall be made in such manner as the city commission shall deem for the best interest of the city," which is, in substance, the same as is provided in § 8007, Rem. Code, relating to the issuance and disposition of such

bonds. Reading these provisions together, in view of the fact that we must proceed upon the presumption that the city authorities are not contemplating selling any of the bonds at such a discount below par that the total amount of such discount and interest, computed at the rate therein specified, will result in the city, in effect, paying interest in an amount greater than the maximum rate allowed by the statute and ordinance, we feel constrained to hold that there are not here alleged or shown any facts warranting the court in interfering upon the ground that the city is disposing of the bonds at less than their par value. Observations made in our recent decision in *Hill v. Seattle*, 108 Wash. 572, 185 Pac. 631, we think, support this conclusion.

It is contended that the election was of no legal effect as a final authorization by the voters of the city for the making of the proposed improvements or the issuance of the bonds, because the election amounted only to the ratification of the ordinance (No. A 435, City of Walla Walla) submitting the proposition, rather than a final ratification of the proposition submitted by the ordinance. The notice of election, as well as the ordinance, in terms, submitted to the voters for their final ratification or rejection the proposition of making the improvements and issuing the bonds. Section 9 of the ordinance provides that,

“If the voters of said city voting at said election shall ratify said proposition and shall ratify this ordinance, by a three-fifths vote as provided by law, then and thereupon the propositions and plans to make additions, and betterments to and extensions of said water works system and to pay the cost thereof by the issue and sale of bonds as in this ordinance provided shall be carried out by the city commission,
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And the prescribed form of the ballot, after submitting the proposition to the voters, concludes with these words: "and shall said ordinance be ratified," so the voters do seem to have expressed themselves in form upon the question of the ratification of the ordinance; but the fact remains that they also express their decision upon the question of the adoption of the proposition. The ordinance concludes with the declaration that it shall take effect immediately. It seems plain to us that the intent expressed in the ordinance and the ballot, when their provisions are considered together, is that the ordinance shall be deemed in full force and effect, in so far as it provides for the submission to the voters of the proposition of making the improvements and the issuance of the bonds, and that the voters could not have understood otherwise. We are of the opinion, therefore, that the election did not fail, in its legal effect, as an authorization for the city authorities to proceed with the improvements and the issuance of the bonds. Our decision in *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998, dealing with a somewhat similar situation, we think, supports this conclusion.

It is contended in appellants' behalf that the election became of no legal effect as a ratification of the proposition, because the notice of election was first published less than thirty days following the passage of the ordinance. This contention is rested upon the theory that the ordinance could not legally go into effect before thirty days following its passage, because of the provision of § 7670-22, Rem. Code, relating to ordinances passed by a commission of a city having the commission form of government, reading as follows:

"No ordinance passed by the commission, except when otherwise required by the general laws of the

state of Washington or by the provisions of this act, except an ordinance for the immediate preservation of the public peace, health or safety, which contains a statement of its urgency and is passed by unanimous vote of the commission, shall go into effect before thirty days from the time of its final passage, . . .”

This language is followed by provisions enabling the voters of the city to invoke a referendum upon ordinances passed by the city commission during a period of thirty days following their passage. This ordinance concludes with a declaration of emergency, and that it “shall take effect and be in force immediately upon its passage and publication.” It is argued that the ordinance is by its nature such that it cannot be emergent, and therefore not capable of being put into effect immediately as such, and thus take away from the voters the right of referendum thereon. It seems to us that this ordinance, in so far as it submits the proposition of making the improvements and the issuance of the bonds to pay therefor, is, in no event, subject to a referendum, because, by its very terms in that regard, and by the express provision of the statute under which it was passed, it is within itself a providing for a referendum. In view of this fact, together with the fact that the ordinance was passed in the exercise of the power conferred upon the city authorities by the law relating especially to cities acquiring public utilities, rather than in the exercise of general powers given by the general organic law of cities having a commission form of government, we are of the opinion that there was no legal impediment to the ordinance going into effect immediately upon its passage and publication, in so far as the submission of the proposition to the voters is concerned; that it did go into effect immediately upon its passage and publication; that it was not subject to referendum, so far as that purpose is con-

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cerned; and that, therefore, the publication of the election notice was not premature, but was as valid and effectual as if made after the expiration of thirty days following the passage of the ordinance.

Some contention is made in appellants' behalf that the proposition was not properly submitted to the voters, because "no sufficient plan or system is set forth therein as required by law." The only requirement of the statute in this regard, § 8006, Rem. Code, is that the "corporate authorities shall provide therefor by ordinance which shall specify and adopt the system or plan proposed, and declare the estimated cost thereof as near as may be." We think it is contemplated by the statute that the system and plan proposed need be specified only in such general terms as will fairly inform the voters of the general nature and extent of the proposed improvements, and that this ordinance sufficiently does so by the specification of the system and plan as summarized near the beginning of this opinion. Our decisions in *Seymour v. Tacoma*, 6 Wash. 138, 132 Pac. 1077, and *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580, support this conclusion.

It is contended in appellants' behalf that two or more separate propositions were submitted as one, so that the voters had no opportunity to vote separately thereon, and that therefore the election was of no legal effect. The argument is that the proposed construction of the reservoir is a proposition so independent of the other proposed extensions that there was, in legal effect, at least two separate propositions submitted to the voters. We cannot agree with this view of the submission of the proposition, since all of the things proposed to be done have to do with additions, betterments and extensions to the city's water works

system as a whole. In *Blaine v. Hamilton*, 64 Wash. 353, 116 Pac. 1076, 35 L. R. A. (N. S.) 577, where there was involved the submission to the voters of several propositions looking to the construction of the Lake Washington canal, and the erection of wharves and docks in the furtherance of that improvement, Judge Gose, speaking for the court, in holding that all was, in legal effect, one proposition for the purpose of submitting the same to the voters, said:

“Counsel for the appellants, in his oral argument, stated that the true test of whether a proposition is single is, will it stand alone. This, we think, is but one of the tests of singleness, and might often be no test at all. The true criterion is, are the several parts of the project so related that united they form in fact but one rounded whole. Either of two converging highways, or either of two public highways terminating upon a highway common to both, would stand alone, but there are few cases which would hold that bonds were invalid where the two were submitted as a single project. Again, we have no doubt that a proposition could be submitted as a unit for bonding the city of Seattle for the construction of one school house on Capitol Hill and another on Queen Anne; or for the construction of isolation hospitals at points remote from each other, if the law permitted bonds for that purpose.”

Our later decisions in *Tulloch v. Seattle*, 69 Wash. 178, 124 Pac. 481; *Aylmore v. Hamilton*, 74 Wash. 433, 133 Pac. 1027, and *Chandler v. Seattle*, 80 Wash. 154, 141 Pac. 331, are to the same effect, and we think leave little room for arguing that the submission to the voters of the proposition here in question was, in legal effect, other than the submission of a single proposition to them.

Contention is made in appellants' behalf that the issuance of the bonds in the sum of \$500,000, as proposed, will increase the city's debt beyond the amount

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allowed by the state constitution and the statutes under which it is sought to incur such indebtedness. In Const., art. VIII, § 6, it is provided:

“No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, nor in cases requiring such assent shall the total indebtedness at any time exceed five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city purposes: Provided, that no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district, or other municipal purposes: Provided further, that any city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding five per centum additional for supplying such city or town with water, artificial light, and sewers, when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality.”

This proposed indebtedness is sought to be incurred under § 8007, Rem. Code, which authorizes the incurring of indebtedness of this nature within the limits in substance the same as in the above quoted provision of the constitution. The assessed valuation of the taxable property within the city is \$9,982,955. The total debt limit of the city might therefore be \$998,295. The city's present indebtedness amounts to only \$390,457. Thus it at once becomes apparent that, when this proposed indebtedness of \$500,000 is added to the total present debt of the city, its total debt will be within its

debt limit of \$998,295. But it is contended, though very briefly argued, that this proposed \$500,000 indebtedness is limited by the final five per cent limitation of indebtedness allowed for supplying the city "with water, artificial light and sewers," viewed apart from the other five per cent debt limit; and also that such five per cent debt-incurring power cannot be exhausted for supplying the city with water alone. Both of these arguments, it seems to us, have been answered in the early decision of this court in *Metcalfe v. Seattle*, 1 Wash. 297, 29 Pac. 1010, wherein Judge Stiles, speaking for the court, said:

"We regard the language of the constitutional provision as reading in the disjunctive, as though it were 'water, artificial light or sewers.' . . .

"The three-fifths majority having been obtained, there is no further obstacle to the issuance of such bonds, although they amount to more than five per cent of the taxable property of the city, providing that with their issuance the total indebtedness of the city is not increased to more than ten per cent of such property."

We fail to see, as at present advised by this record and counsel's presentation of this question, wherein the constitutional or statutory debt limit of the city will be exceeded by incurring this \$500,000 indebtedness.

Two or three other grounds for interference by the court with the proposed action of the city authorities looking to the making of the improvements and the issuance of the bonds are briefly suggested, but we deem it sufficient to say that we regard them as without merit, in so far as the relief sought, or which should be granted in this action, is concerned.

The judgment is affirmed.

HOLCOMB, C. J., TOLMAN, FULLERTON, and MOUNT, JJ., concur.

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Dissenting Opinion Per MAIN, J.

MAIN, J. (dissenting)—In this case I am unable to agree with the conclusions reached in the majority opinion upon two points. The first is the holding that, under the statutes of this state, Remington's Code, §§ 7612 and 8005, which authorize cities to condemn property "within or without the corporate limits" thereof, cities have the power to condemn land not only in this state, but in the state of Oregon, providing that state shall have given its consent. When the legislature provided that cities of this state might acquire property by condemnation or purchase within or without the corporate limits thereof for the purpose of providing a water supply, it was certainly not within the contemplation of that body that the power would be exercised in a foreign state. It goes without saying, of course, that the legislature of this state had no power to authorize the taking of property in the state of Oregon without the consent of that state. This question, however, is of minor importance, because, if the language of the statute is not broad enough, the legislature at its approaching session could, and probably would, grant the power in more comprehensive terms.

The other question upon which I am constrained to disagree with the majority is the holding that property in one state may be taken for a public use in another state. While the present case is an attempt on the part of a city of this state to condemn land in the state of Oregon for water works purposes, the question is treated in the majority opinion as though it were an Oregon city seeking to do in this state what Walla Walla is seeking to do in Oregon. I will therefore treat the question in the same manner. Under Const., art. 1, § 16, private property may be taken for a public use, and whenever an attempt is made to take prop-

erty for such purpose, "the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public." Under this provision of the constitution, it becomes the duty of the court to determine whether public use as there used means public use for the benefit of the people of this state, or whether it has a broader meaning and includes a public use for the benefit of the people of an adjoining state. In *Grover Irrigation etc. Co. v. Lovella Ditch etc. Co.*, 21 Wyo. 204, 131 Pac. 43, the supreme court of Wyoming, as I read the opinion, had this precise question before it and determined it, holding that public use meant public use for the benefit of the people of the state from which the power is derived. In that case an irrigation company in the state of Colorado sought to condemn land across the border in the state of Wyoming. The public use for which the property would be acquired was for the benefit of the people of Colorado. Two points were urged there against the right to condemn: "First, that land in this state cannot be taken by condemnation where the only proposed use in this state is the irrigation of lands in another state." The second question it is not necessary here to refer to. In deciding the first question it was said:

"It will not be necessary to consider the second proposition or either of its divisions suggested by the argument, for in the view we take of the case the fact that all the water to be diverted by means of the head-gate and ditch is to be used exclusively for the irrigation of land in another state is sufficient to cause a reversal of the judgment."

The trial court had sustained the claimed right to condemn. Before the opinion concluded, it was suggested that it probably would be difficult to find author-

ity in the statutes to condemn land for the benefit of the business of a foreign corporation conducted exclusively in another state, but this question was not decided because the "petitioner has shown no right under the constitution or statute of this state to condemn the land in controversy." In *Washington Water Power Co. v. Waters*, 19 Ida. 595, the plaintiff, a Washington corporation engaged in the business of supplying light and power in the state of Washington and also in the state of Idaho, sought to condemn land in the latter state for the purpose of enlarging its plant. The right to condemn was there sustained upon the sole ground that the condemning company was serving people of the state of Idaho and that the purpose to which the property would be devoted was a public use within that state. The fact that the same company was serving the people of another state also, would not deprive it of the right to condemn. In the course of the opinion it was said:

"Condemnation could evidently not be had in this state for the purpose alone of serving a public use in another state, but where the use for which the condemnation is sought is a public use in this state, and will serve the citizens of this state—their demands, necessities and industries—the fact that it may incidentally also benefit the citizens and industries of a neighboring state will not defeat the right of condemnation.

"It would be difficult, and indeed unreasonable, to say that the energy generated by the water power of this state should only be used in operating cars to and from the state line, and that in order to propel them thence to Spokane and back to the state line the company must secure its power in some other way and from some other source. . . . This demonstrates the correctness of the proposition above stated that the test must be—is the use a public use within this state, and does it serve the interests of the people of

this state? If it does so, the fact that it incidentally or in connection therewith likewise serves the interests of a neighboring state, and the people of such state, will not render it any the less a public use, or the service any the less a public service, subject to the regulation and control of the state."

While the right of condemnation there was sustained, it was upon the sole ground that the property taken would, in part at least, be devoted to a public use in that state. The court recognized that, if the property was being taken solely for the public use in another state, the right of condemnation would not exist.

The writer of the article on Eminent Domain in 10 R. C. L., at page 20, expresses the opinion that property in one state cannot be taken under the power of eminent domain for a public use in another state. In Lewis on Eminent Domain, § 310, upon the same question, it is said:

"The public use for which property may be taken is a public use within the state from which the power is derived."

In Nichols on Eminent Domain (2d ed.), vol. 1, p. 97, the author states the law to be as follows:

"One state cannot take or authorize the taking of property situated within its limits for the use of another state. Any employment of the power of eminent domain for other purposes than to enable the government of the state to exercise and give effect to its proper authority, effectuate the purpose of its creation and carry out the policy of its laws could not be rested upon the justification and basis which underlie the power, and has never received the sanction of the courts. Accordingly, it would seem that if a municipality was located close to the boundary of another state, and the only available property for satisfying the necessity and convenience of its people for such

purposes as a water supply, a sewer outlet, or a park was situated across the boundary line, it would be impossible to take the necessary land by eminent domain even with the consent of the state in which it was situated, for the legislature of neither state would have power to grant the requisite authority—in one case because the property sought to be taken was not within its jurisdiction, and in the other because the use for which it was sought to take the property was not one for which it lay within its power to invoke the exercise of eminent domain. . . .”

Two cases are referred to in the majority opinion as supporting the conclusion there reached, but I did not so read them. In the New York case of *In re Townsend*, 39 N. Y. (App. Div.) 171, the right to take property in that state by the New Jersey Canal Company was sustained because the canal was a public benefit and of public use to the people of the state of New York. It was there said:

“It does not follow, because the canal is outside the state limits, that its construction and maintenance are not for a public use, within the meaning of our constitution. If it were within our limits, what are the public benefits to result from its construction? Not merely that our citizens may use it for transportation or travel. Providing transportation to market and facilitating intercommunication are some of the public purposes of such improvements; but communication between our chief cities and the productive regions which lie outside our state, and intercourse with those who dwell there, are as truly objects of public interest and advantage as between two sections of the state itself. Besides, the court cannot say that the Morris canal does not run within the reach of a portion of our own citizens, and directly aid them in the conduct of their intercourse with our eastern border, or the counties along the Hudson river to which it runs.”

The doctrine there applied is similar to the doctrine which permits a railway company to condemn land.

The other case is that of *Reddall v. Bryan*, 14 Md. 444. There the court had before it a statute which granted to the Federal government the right to exercise the power of eminent domain in the courts of that state for the purpose of acquiring property necessary to the furnishing of the city of Washington with water. This case is not in point, for two reasons, first, the relation between the Federal government and the state is very different from the relation which exists between two states; and second, even without the act of the legislature of the state, the Federal government had the power to acquire by condemnation such property as was necessary to the exercise of the powers conferred upon it by the constitution. *Kohl v. U. S.*, 91 U. S. 367. This right is sustained upon the ground that property acquired for the purpose of the national government, being for the use of the people of all the states, is as well for the use of the people of that state where it is located. Lewis on Eminent Domain (3d ed.), vol. 1, § 309; Cooley's Constitutional Limitations, 655, and *Grover Irrigation etc. Co. v. Lovella Ditch etc. Co.*, *supra*. So far as I am informed, there is no authority for the holding of the majority opinion that property may be taken in this state for a public use in the state of Oregon when it is disassociated with any public use or benefit to the people of this state. Not only is such a holding not supported by authority, but reason is against such a conclusion. When it was provided in the constitution that private property in this state might be taken for a public use, and that whether a contemplated use should be really public should be a judicial question, it was undoubtedly and plainly contemplated that that public use was a public use for the benefit of the people of this state, and that it was not contemplated by the framers of the

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constitution that the language there used should be stretched to include the public use in a neighboring state in no way connected with the public use in this state. If the term public use is to be given this broad meaning, then the public service company in Oregon, or any other adjoining state, may come into this state and acquire property by condemnation for a public use in another state which does not in any way serve the people of this state. It seems to me that the language of the constitution should be adhered to and that its meaning should not be thus broadened.

For the reasons stated, I am unable to concur in the majority rule on the two points mentioned, and I therefore respectfully dissent.

MITCHELL and MACKINTOSH, JJ., concur with MAIN, J.

BRIDGES, J. (dissenting)—I concur in the foregoing dissenting opinion concerning the power to take private property in one state for a public use in another state, which, indeed, is the chief ground of dissent.

[No. 15407. Department One. September 14, 1920.]

OLE SANDANGER, *Respondent*, v. CARLISLE PACKING
COMPANY, *Appellant*.¹

MASTER AND SERVANT (31,155)—INJURY TO SERVANT—NEGLIGENCE—FURNISHING UNSAFE APPLIANCES. The furnishing of gasoline in a kerosene can which was customarily used for kerosene to start a fire in the galley stove of a motor boat, is negligence rendering the owner liable for injuries sustained by a member of the crew through an explosion resulting from its attempted use under circumstances from which he might assume that the contents was kerosene.

MASTER AND SERVANT (147)—INJURY TO SERVANT—CAUSE OF ACCIDENT—EVIDENCE—SUFFICIENCY. Upon an issue as to whether defendant negligently filled a kerosene can with gasoline, as part of the equipment of a motor boat, resulting in an explosion, injuring a servant who attempted to start a fire with it, a finding for plaintiff is sustained where there was evidence that the can was filled from appellant's stores on shore shortly before starting on the trip; that the explosion was of great violence and clearly showed that the use of a small quantity of gasoline would generate fumes sufficient to cause such an explosion, while a similar use of kerosene would not do so, there being no suggestion that the contents of the can was other than kerosene or gasoline.

SEAMEN (3)—INJURY TO SEAMEN—COURTS—CONCURRENT JURISDICTION. The rights of a seaman as to injuries resulting from unseaworthiness of the ship are the same under the rules of the common and the maritime law.

ADMIRALTY (3, 4)—MARITIME TORTS—INJURY TO SEAMAN—JURISDICTION OF COURTS—COMMON LAW REMEDY. A member of the crew of a motor boat injured by an explosion of gasoline negligently furnished in a kerosene can as part of the equipment of the boat, when attempting to use the contents of the can in the customary manner in starting a fire in the cook stove, may sue in the state courts for damages sustained from such injuries, and is not limited under the maritime law to a recovery of necessary expenses in his maintenance and cure, though his employment and service was maritime in its nature; since the recovery will be sustained on the theory that the injuries were received in consequence of the unseaworthiness of the ship.

¹Reported in 192 Pac. 1005.

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Opinion Per PARKER, J.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 3, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a seaman through an explosion of gasoline. Affirmed.

Hadley & Hadley and Kerr & McCord, for appellant.
Fred H. Lysons, for respondent.

PARKER, J.—The plaintiff, Sandanger, commenced this action in the superior court for King county, seeking recovery from the defendant packing company for personal injuries alleged to have been the result of the negligence of the defendant in furnishing as a part of the equipment of one of its motor boats, upon which he was employed, gasoline in a one-gallon kerosene oil can, under such circumstances as to induce him to innocently use it as kerosene; resulting in a flareup or explosion, causing him to be seriously burned. Trial in the superior court sitting with a jury resulted in a verdict in favor of the plaintiff and a judgment rendered thereon in the sum of \$4,175, from which the defendant has appealed to this court.

Respondent, Sandanger, is a resident of this state. Appellant packing company is a corporation created and existing under the laws of this state, with its general offices in Seattle. It owns and operates a salmon cannery near Cordova, Alaska, in connection with which it owns and operates several motor boats. On and prior to March 7, 1917, respondent was employed by appellant to work in and about its cannery, and also upon its motor boats as he might be directed. On that day he was assigned to duty upon one of appellant's motor boats as one of the crew consisting of himself

and three others, one Stensland being in command. The boat was twenty-eight feet long, with an enclosed cabin forward, in which there was a motor near the middle, and a bunk and bench along one side, and a bench along the other side, on which sat a small sheet iron wood-burning stove used for cooking meals for the crew. Under the bench, on which the stove sat, but further forward, and evidently in a safe place, there sat the one-gallon kerosene oil can here in controversy. This can, with kerosene in it, had been furnished as a part of the boat's equipment, for the purpose of filling the lamps of the boat. According to conceded custom, kerosene was taken from the can and used to start fires in the small cook stove; that is, by first pouring a small quantity of kerosene on the wood and then applying a lighted match to the fuel so prepared. We here note in passing that there is no suggestion in the argument of counsel that such use of the kerosene constituted carelessness on the part of one so using it.

Respondent had worked upon this boat as a member of its crew on several former occasions and was well acquainted with its arrangement and equipment, including the kerosene oil can, and also the custom of using kerosene from the can to start fires in the stove. About seven o'clock in the morning of the day in question, the boat left the cannery to go some twenty miles southwesterly to a place where suitable sand could be procured for some contemplated masonry work, with a view to bringing back a load of the sand in sacks. The boat arrived at its destination about an hour or so before noon. The boat was provisioned for the noon meal of the crew, in view of the fact that the trip would take all day. One of the crew started a fire in the cook stove for the purpose of preparing the noon meal, using, instead of kerosene, a bunch of waste which had

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become saturated with oil from use in wiping the engine. The meal being prepared, and evidently the work of loading the sand being finished, the food was brought out on deck, where it was served and eaten. It seems that the boat at that time had started on its homeward journey, and the work of the day, other than washing the dishes, being finished, the crew were at ease and privileged to rest and enjoy themselves.

About an hour and a half or two hours after serving the meal, when the fire in the cook stove was allowed to go out, and after it actually had gone out and the stove and ashes therein had become cold, according to positive testimony which the jury had a right to believe, respondent was directed by Stensland to start a fire in the stove and heat water to wash the dishes. He went into the cabin, placed some wood in the stove, took the kerosene oil can from its accustomed place, poured a small quantity of whatever was in the can on the wood, then holding the can in one hand away from the stove, lighted a match and dropped it upon the wood in the stove, when instantly there was a flareup of great violence, amounting practically to an explosion, which was of such force as to cause some damage apart from the mere burning that immediately followed. Respondent was thrown across the cabin, but soon recovered himself and rushed upon deck with his clothes on fire. His associates being unable to put out the fire on his clothes, he jumped overboard, when a plank was thrown to him and he was taken on board. The fire in the cabin was extinguished and the boat proceeded to Cordova as fast as possible, arriving there late in the afternoon, when respondent was given medical treatment. Respondent's counsel prosecuted the case, and was awarded recovery, upon the theory that appellant had negligently furnished gaso-

line in the kerosene oil can instead of kerosene, and that such act was negligence on the part of appellant rendering it liable to respondent for the injuries received in the manner we have described.

It is first contended in appellant's behalf that the trial court erred in overruling its challenge to the sufficiency of the evidence to support recovery on the ground of its negligence, presented by proper motions timely made. Practically the whole of the argument of counsel touching this contention, apart from the Federal maritime question to be presently noticed, has to do with the question of whether the kerosene oil can contained gasoline or kerosene at the time respondent used whatever was in the can to start the fire in the stove. If it was kerosene, appellant would not be responsible for respondent's injuries; while if it was gasoline, it seems plain that, because of the liability of gasoline to generate explosive gas when so used, appellant would be responsible for respondent's injuries; or, rather, a jury could well find from the evidence that the furnishing of gasoline under such circumstances was negligent and the proximate cause of respondent being injured. There was testimony fully warranting the jury in believing that, when the boat returned to the cannery from its previous day's trip, there was no kerosene or other fluid in the can, it being all used that day in filling the boat's lamps, and there being none left even for the starting of a fire in the cook stove on that day; that whatever was in the can at the time respondent was injured was put into it from appellant's store of supplies on shore between the time the boat returned the day before and the starting of the boat on its trip that day, and that no one attempted to use whatever was in the can to start a fire in the cook stove that day until respondent did so.

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The evidence does not disclose with certainty who filled the can or where it was filled, but there is some ground for inferring that it was filled by Stensland, the commander of the boat, from appellant's store of supplies on shore. It, in any event, seems to have been his duty to see that the can was filled. There is some evidence tending to show that appellant did not exercise due care in keeping its gasoline and kerosene receptacles in its store of supplies on shore properly designated so that their respective contents would be readily distinguishable. This evidence is not very satisfactory, but is of some moment in view of what actually happened. The testimony of chemists and men of experience, with reference to the comparative burning and explosive qualities of kerosene and gasoline, furnished the jury abundant ground for believing that the use of kerosene in a cold stove in the manner respondent used whatever was in the can when he attempted to start the fire would not cause any such an explosion as then occurred; while the use of gasoline in a cold stove in such manner would cause such an explosion. That is, by the pouring of a small quantity of kerosene on the wood, explosive fumes would not be generated sufficient to cause an explosion by the applying of a lighted match thereto; while such use of a small quantity of gasoline would generate fumes sufficient to cause such an explosion. There is no suggestion in the argument of counsel, indeed we think there is no ground therefor, that the contents of the can was other than kerosene or gasoline; so it becomes a question of the evidence showing with a fair degree of probability that it was gasoline instead of kerosene; that is, as to whether the evidence was such as to take the answer to that question out of the realm of speculation and conjecture.

Counsel for appellant rely upon our decisions which are reviewed by Judge Chadwick in *Parmelee v. Chicago, M. & St. P. R. Co.*, 92 Wash. 185, 158 Pac. 977, holding, in substance, that the evidence must be such as to prove a fact necessary to recovery by a degree of certainty that removes the inquiry from the realm of speculation and conjecture. We have no disposition to recede from the holdings in those decisions. We are of the opinion, however, that the evidence introduced upon the trial of this case was such as to render these decisions without controlling force upon our present inquiry. Were we trying the question of fact which the jury were called upon to determine, we might not arrive at the same conclusion, but that is not sufficient to warrant us in ignoring the verdict. We are not the triers of the facts, but are permitted here to inquire only as to whether or not there was substantial evidence to support the conclusion the jury arrived at; that is, as to whether or not the evidence leaves the answer to the question as one of speculation and conjecture. We hardly think it possible to state in general terms a rule which would furnish any exact measure for the decision of questions like this. Probably the language of Judge Chadwick in *Frescoln v. Puget Sound T., L. & P. Co.*, 90 Wash. 59, 155 Pac. 395, comes as near as is possible of doing so, wherein he said:

“Speculation and conjecture, when used in this connection, mean the same thing. The cause of an accident may be said to be speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another. As soon as the balance of possibilities is broken, the jury is put to the burden of weighing the evidence.”

We think the jury was put to such burden in this case, and conclude that the trial court did not err in refusing to sustain the challenge made to the evidence

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in appellant's behalf, viewing this branch of the inquiry, as we have, apart from the Federal maritime question, which we will now proceed to notice.

Counsel for appellant contend that respondent's recovery, as to its measure, is controlled exclusively by the maritime law as administered in the Federal courts in admiralty cases, and that he possesses no rights whatever under substantive common law, because his employment and service on the day he was injured was purely of a maritime nature; and, while admitting that respondent may seek recovery from appellant in the common law courts of the state, that his recovery is limited under the maritime law by the amount of necessary expenses he may incur in his cure, and maintenance while being cured, which is conceded to be \$175, in addition to the service of that nature already rendered him by appellant.

It does seem that respondent's employment and service on the day in question was maritime in its nature. We shall so assume in our disposition of the case, without further discussion of that question. *The Minna*, 11 Fed. 759; *Saylor v. Taylor*, 77 Fed. 476; *Lawrence v. Flatboat*, 84 Fed. 200; *Domenico v. Alaska Packers' Ass'n*, 112 Fed. 554; *The J. S. Warden*, 175 Fed. 314; *The Virginia Belle*, 204 Fed. 692; *North Alaska Salmon Co. v. Larsen*, 220 Fed. 93.

Counsel for appellant invoke the Federal statute defining the admiralty jurisdiction of the Federal district courts, reading as follows:

"Sec. 24. The district courts shall have original jurisdiction as follows: . . .

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; . . ." 36 U. S. Stat. at L., 1091.

Proceeding upon the theory that this statute saves to suitors merely the right to sue in the common law courts and avail themselves of the procedure of those courts, and does not enable such suitors to avail themselves in those courts, any more than in the Federal admiralty courts, of the rules of substantive common law as controlling of their rights, counsel for appellant invoke the principles of maritime law as announced by Mr. Justice Brown, speaking for the supreme court of the United States in *The Osceola*, 189 U. S. 158, after reviewing the subject at length in the light of its historical development, as follows:

“Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:

“1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

“2. That the vessel and her owners are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.

“3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

“4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.”

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If our decision in *Larson v. Alaska Steamship Co.*, 96 Wash. 665, 165 Pac. 880, L. R. A. 1917 F 671, is to remain as a correct exposition of the law touching our present inquiry, that decision seems to us to be here decisive in favor of appellant. The employment and service of the plaintiff involved in that case was concededly maritime in its nature. He was injured while the ship was anchored off shore in Alaska waters, when at work preparatory to working cargo, by falling through a hatch of the ship upon his taking hold of an insecurely fastened chair pedestal to steady himself as he was about to descend through the hatch, which, giving way, caused him to fall and suffer the injuries for which he was awarded recovery. Contention was there made against the plaintiff's right of recovery upon the same theory in substance as the contention is here made in behalf of the appellant; but it was then thought by the members of this court participating in that case that the decision of the Federal supreme court in *The Hamilton*, 207 U. S. 398, and other prior Federal decisions, called for the conclusion that a substantive common law right could be invoked by the plaintiff apart from the maritime law; but the language of the decision also seems to clearly indicate that the plaintiff's right of recovery could be rested upon the exception to the limitations put upon seamen's recovery by the maritime law, mentioned in the second of the maritime law propositions above quoted from the *Osceola* decision; that is, that the vessel and her owner are "liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship," and, as to such injuries, are not limited to expenses incurred for maintenance and cure. Concluding his discussion of the legal basis of the plaintiff's

right of recovery in that case, Judge Chadwick, speaking for the court, at page 675, said:

“Our conclusion is that an action *in personam* may be maintained for a tort committed on the high seas if the accident is attributable to the ‘unseaworthiness’ of the vessel; that the common law courts of a state have jurisdiction concurrent with the Federal courts when proceeding *in personam*, and that the state court will grant the relief that a common law court would have granted had the case been originally triable in such court.”

This, it seems to us, is but a recognition, and correctly so, that, as to injuries resulting in consequence of unseaworthiness, the rules of common and maritime law governing such a suitor’s rights are the same. Now, if the insecurely fastened chair pedestal, the giving way of which caused the plaintiff Larson to be injured, was “in consequence of the unseaworthiness of the ship,” as we think was correctly held in that case, so as to enable him to recover under the maritime law, which in effect adopts the rule of the common law as to injuries so occasioned, it seems to us equally plain that the negligent furnishing of gasoline as kerosene under the circumstances inducing its dangerous use, as was done in this case, rendered this boat unseaworthy in the same sense that the ship was rendered unseaworthy in the *Larson* case. It seems hardly possible to state in general terms a definition of “unseaworthiness,” as used in the maritime law in this connection, which will furnish an exact standard in all cases in determining just what defects in structure or equipment should be considered as rendering a vessel unseaworthy. In *Carver on Carriage of Goods By Sea* (6th ed.), § 18, it is said: “The ship must be fit in design, structure, condition and equipment to encounter the ordinary perils of the voyage. (a) She must also

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have a competent master and a competent and sufficient crew." This was said having in view the general question of liability of carriers to the shippers; but we apprehend that the law calls for an equal degree of safety as to "design, structure, condition and equipment," looking to the safety of seamen. It seems to us that the negligent furnishing of the gasoline in the place of kerosene, under such circumstances as was done in this case, was fraught with even greater perils than the furnishing of the insecure chair pedestal, as was done in the *Larson* case. The former menaced the safety and even the lives of the entire crew, and the existence of the boat itself; while the latter was a menace only to the individual that might seek to use it in some such manner as *Larson* did. The following authorities, we think, lend support to our conclusion that the maritime law does not stand in the way of respondent's recovery in this case. *The Titana*, 19 Fed. 101; *The Noddleburn*, 28 Fed. 855; *The Troop*, 128 Fed. 856; *The M. E. Luckenbach*, 174 Fed. 265; *The Argo*, 210 Fed. 872; *The Badger*, 218 Fed. 81.

Counsel for appellant call to our attention, and strongly rely upon, the decision of the supreme court of the United States in *Chelentis v. Luckenbach Steamship Co.*, 247 U. S. 372. That decision, it is argued, establishes the law as different from our conclusions reached in the *Larson* case, and also different from what was theretofore generally thought to be the law as gathered from expressions of the courts found in previous Federal and state decisions. A seaman was washed overboard and his leg broken, as it was claimed, as a result of a negligent and improvident order given by a superior officer. It was held that he could not recover as for injuries received "in consequence of the unseaworthiness of the ship," and therefore could not

recover damages at all as for negligence. Plainly that was not a case of unseaworthiness of the ship. We think that decision does not express any view of the law contrary to our conclusion reached in the *Larson* case, other than contrary to our seeming conclusion there reached that Larson's recovery could be rested upon the common law apart from the maritime law.

We conclude that respondent's recovery in this case may be sustained upon the theory that his injuries were received in consequence of the "unseaworthiness" of the boat upon which he was working.

A number of assignments of error are made by counsel for appellant touching the court's giving instructions and its refusal to give certain requested instructions. What is said in the briefs touching these claims of error is practically nothing more than assertions of error, they being presented to us practically without argument. We do not feel called upon to dispose of them other than in an equally summary manner, and deem it sufficient to say that, as is disclosed by the record and brief of counsel before us, we are unable to say that the court committed any prejudicial error in the giving or refusing to give instructions.

The judgment is affirmed.

HOLCOMB, C. J., MAIN, MITCHELL, and TOLMAN, JJ.,
concur.

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[No. 15894. Department One. September 14, 1920.]

FREMONT STATE BANK, *by Louis H. Moore, State Bank
Examiner, Respondent*, v. S. H. VINCENT,
Appellant.¹

BANKS AND BANKING (1)—INSOLVENCY—STOCKHOLDER'S SUPERADDED LIABILITY—SALE OR TRANSFER OF STOCK. Under Const., art. 12, § 4, making stockholders of banks liable for debts that "accrued while they remain such stockholders", to the extent of the par value of the stock, a sale and transfer of stock in good faith prior to insolvency of the bank does not relieve the stockholder from obligations existing at the time of his ownership of the stock.

SAME (2)—EXTENT OF LIABILITY—REISSUANCE OF CERTIFICATES OF DEPOSIT—CREATION OF NEW DEBT. The superadded liability imposed upon stockholders by Const., art. 12, § 4, is not original but secondary, and in substance the liability of a surety, and a former owner of stock is not liable for an obligation incurred by a bank through the issuance of new certificates of deposit, after taking up and paying interest on the former certificates, long after he had ceased to be a stockholder, since the issuance of the new certificates was the creation of a new obligation.

SAME (1) — EXTENT OF LIABILITY — ASSESSMENT OF STOCK. A former owner of sixty of the five hundred shares constituting the capital stock of an insolvent bank is liable under the superadded liability imposed by Const., art. 12, § 4, equally and ratably, for 60/500 of the amount of obligations incurred while he was a stockholder of the bank.

INTEREST (25)—SUPERADDED LIABILITY OF STOCKHOLDER. Where demand was made upon a stockholder of an insolvent bank for payment of his superadded liability, he is liable for interest at the legal rate of six per cent from the time of such demand, upon the amount of his proportional liability found to be due.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 25, 1920, upon findings in favor of the plaintiff, in an action to enforce the superadded liability of a stockholder of an insolvent bank, tried to the court. Reversed.

¹Reported in 192 Pac. 975.

Charles E. Congleton, for appellant.

D. E. Twitchell, for respondent.

PARKER, J.—The plaintiff, bank examiner, commenced this action in the superior court for King county, seeking recovery from the defendant, Vincent, upon his constitutional superadded liability as a stockholder of the plaintiff bank, for the benefit of its creditors. Trial upon the merits in the superior court, sitting without a jury, resulted in findings and judgment in favor of the bank examiner, from which the defendant has appealed to this court.

The controlling facts, as we view them, are not in dispute, and may be summarized as follows: The plaintiff bank was at all times in question, up until going into the hands of the state bank examiner for the purpose of liquidation because of its insolvency, a duly organized banking corporation under the laws of this state, carrying on its business in the city of Seattle. The capital stock of the bank has at all times consisted of 500 shares of the par value of \$100 each. Appellant, Vincent, was one of the original subscribers for the shares of stock of the bank, thereby becoming the owner of sixty shares thereof. On January 31, 1917, the bank became insolvent and passed into the hands of the state bank examiner for the purpose of liquidation. The bank examiner determined that the liabilities of the bank exceeded its assets in an amount such as to call for the enforcement of the full constitutional superadded liability of its stockholders, notified and made demand accordingly upon the stockholders, and also upon appellant as one of the stockholders. Appellant declining to pay as demanded of him, upon the ground that he was not a stockholder when the bank became insolvent, and therefore not liable as a stockholder for any of the bank's obliga-

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tions, the examiner commenced this action, which resulted in a judgment against appellant for the sum of \$6,000, and interest, being the full constitutional superadded liability upon the owner or owners of the sixty shares of stock here in question. On June 14, 1916, which, it will be noticed, was over seven months before the bank passed into the hands of the bank examiner, and, as we think appears, at a time when the bank was a sound and going concern, appellant, in good faith, sold and transferred his sixty shares of stock to one McCutchin, which transfer was on that day duly evidenced upon the books of the bank by proper record thereof. The liabilities of the bank were found to be approximately \$230,000, while its assets were approximately \$130,000. There are of the liabilities \$26,164.02 of savings accounts, and \$645.55 of checking accounts, which were incurred by the bank before appellant disposed of his shares of stock. There were also of the liabilities \$8,275 of certificates of deposit, which were renewals of certificates of deposit of an equal total amount which had been issued before appellant disposed of his shares of stock, which original certificates of deposit were surrendered and interest paid thereon and new certificates of deposit issued in an equal amount to the same depositors some time after appellant disposed of his shares of stock. In the liquidation of the bank's affairs, the examiner has paid, as found by the trial court, to the "general creditors of the bank," dividends aggregating forty-five per cent. The record, we think, shows, indeed counsel seems to concede, that the affairs of the bank are about wound up; that there is in the hands of the examiner a sum approximately sufficient to pay the expense of bringing the trust to a close, but not sufficient to pay any further dividends to creditors, and that there will

be no further dividends paid, except from such funds as may be ultimately recovered from appellant in this action.

It is first contended in appellant's behalf that he is not liable in any amount upon his constitutional super-added liability with reference to the sixty shares of stock, because he had, in good faith, sold and transferred the shares of stock and caused such transfer to be duly made of record on the books of the bank long before it became insolvent. Counsel invoke the rule as announced by the Federal courts under the national banking law, in substance, that a sale and transfer of shares of stock, made in good faith and evidenced as the law requires, relieves the transferrer of his super-added liability, both as to existing and future obligations of the bank; and that such transfer not only gives to the transferee title to the stock, but also imposes upon him the superadded liability, both as to existing and future obligations of the bank, and thereby entirely relieves the transferrer from such liability. This view of the law is rested upon the language of § 5151, of the U. S. Rev. Stats., reading as follows:

"The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

This is the view of the law adopted in many states where superadded liability is imposed upon bank stockholders by constitutional or statutory language of the same general import. The language of our constitution, however, imposing superadded liability upon bank stockholders is much farther reaching, and seems to leave no escape from the conclusion that stockholders

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do not relieve themselves from such liabilities as to existing obligations of the bank by sale and transfer of their shares of stock. In Const., art. XII, § 11, we read:

“ . . . Each stockholder of any banking or insurance corporation or joint stock association shall be individually and personally liable equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation or association *accruing while they remain such stockholders*, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares.”

We have italicized the words to be particularly noticed, and which are not found, either in form or substance, in the written law, either constitutional or statutory, of the National Government or the states with reference to which the rule invoked by counsel for appellant obtains. The decision of this court in *Shuey v. Holmes*, 21 Wash. 223, 57 Pac. 818, seems to be decisive against the contention here made upon this question in appellant's behalf, wherein it was squarely held that a transferee of shares of stock in a state bank did not have imposed upon her the superadded liability mentioned in the constitution as to an obligation of the bank created and incurred before she became a stockholder by virtue of such transfer. Affirming the decision of the trial court so holding, Judge Gordon, speaking for the court, said:

“The judgment of the lower court was right, for the simple reason that it does not appear from the statement or from anything contained in the record, neither was it alleged in the complaint, that the whole or any part of the indebtedness of the bank was incurred or created at any time while the respondent was a stockholder of the bank. It is evident that the theory upon which the receiver proceeded was that all

stockholders of the bank at the date when its insolvency was adjudged and a receiver appointed, viz., January 7, 1897, were liable, without regard to whether they were such stockholders at the time when the indebtedness arose. This was a mistaken theory, and nothing is needed to demonstrate the mistake, other than the plain language of the constitutional provision just quoted. This superadded liability of the stockholder which exists by virtue of the statute and constitution is personal, and does not follow the stock. The obligation rests on the stockholder, not on the stock."

It seems to us to necessarily follow that the prior owner of stock, owning it when the obligation of the bank was incurred, must respond to the superadded liability and so contribute to the satisfaction of such obligation of the bank. The only decision coming to our notice which can be said to be exactly in point upon this question is that of the supreme court of West Virginia, in *Dunn v. Bank of Union*, 74 W. Va. 594, 82 S. E. 758, L. R. A. 1915 B 168, in which case this conclusion was reached, having under consideration a superadded liability of bank stockholders under a similar constitutional provision; that is, one rendering the stockholders liable "to an amount equal to their respective shares so held, for all liabilities *accruing while they were such stockholders*." We feel constrained to hold that appellant did not, by the sale and transfer of his stock, escape the superadded liability as prescribed by our constitution as to obligations of the bank incurred while he was a stockholder.

It does not follow from what we have said thus far that appellant is liable to the extent adjudged by the trial court. To determine the extent of his liability in this case it manifestly becomes necessary for us to inquire as to the amount of the present obligations of the bank which were created and accrued while he was a stockholder. We have seen that \$8,275 of certificates

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of deposit, held by the court to have accrued while appellant was a stockholder, was, as a matter of fact, issued some time after he ceased to be a stockholder. The argument made in behalf of the bank examiner, and the theory of the trial court, seems to be that the issuance of the new certificates of deposit, after taking up and paying interest upon the former certificates, was but a continuation of the original debt evidenced by the original certificates of deposit. We do not think this theory is sound. It is true that the *Dunn* decision in the West Virginia case, above noticed, does seem to lend support to this contention made on behalf of the bank examiner; but a critical reading of that decision renders it plain that that court proceeded upon the theory that the superadded liability was an original liability on the part of a stockholder as principal. But this court, in the early case of *Wilson v. Book*, 13 Wash. 676, 43 Pac. 939, adopted the view, which seems to have abundant support in the authorities, that the stockholder's superadded liability is not original but secondary, and is, in substance, the liability of a surety. This view, we think, is quite in harmony with our conclusion here reached, that when the original certificates of deposit were taken up, interest paid thereon, and new certificates issued, there was created a new loan from the depositor to the bank, and a new obligation at a time long after appellant had ceased to be a stockholder in the bank, and after such fact was duly evidenced by record of the transfer of his stock upon the books of the bank. The decision of the supreme court of Minnesota in *Seymour v. Bank of Minnesota*, 79 Minn. 211, 81 N. W. 1059, lends strong support to this conclusion. We conclude that appellant's superadded liability did not render him liable to contribute any-

thing towards the payment of the bank's debt evidenced by these certificates of deposit.

We have remaining of the bank's liabilities the savings accounts amounting to \$26,164.02, and its checking accounts amounting to \$645.55, constituting obligations incurred while appellant was a stockholder of the bank. We cannot escape the conclusion that he is liable to contribute towards the payment of these obligations, or rather towards the unpaid portion of them, "equally and ratably" with the other stockholders of the bank. We have seen that the bank examiner has already paid forty-five per cent in dividends to the "general creditors of the bank." This we interpret as meaning that forty-five per cent of these savings and check deposit claims have been paid. The total amount of these claims was \$26,809.57. Deducting forty-five per cent of dividends paid upon them, which is \$12,064.30, leaves \$14,745.27 remaining unpaid. The appellant, being the owner of 60/500 of the entire capital stock of the bank, is liable to pay a like proportion of this balance due upon these savings and checking deposit claims, which is \$1,769.43. The demand upon the stockholders, including appellant, for payment of their superadded liability was made by the bank examiner on May 15, 1917, hence appellant would be liable for interest at the legal rate, to wit, six per cent upon that sum from that date. This is not questioning or revising in any way the one hundred per cent assessment made by the bank examiner, calling for the payment of the full superadded liability by the stockholders; and is not in conflict with our decision in *Hanson v. Soderberg*, 105 Wash. 255, 177 Pac. 827, wherein we held that the determination of the amount, or rather percentage of the assessment, up to the one hundred per cent limit, was within the discretion of the bank examiner. It is but

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the charging appellant with the portion of that assessment which he as a stockholder is liable to pay. Nothing could seem plainer than that the owner or owners, whether one or many, during different periods of ownership of these sixty shares of stock, shall not be required to pay more than the total of one hundred per cent, or \$6,000, as the total superadded liability of all of such owners of that stock.

The judgment of the trial court is reversed, and the cause remanded with directions to enter a judgment in favor of the bank examiner and against appellant for the sum of \$1,769.43, with interest thereon at six per cent from May 15, 1917. Appellant will recover his costs upon this appeal.

HOLCOMB, C. J., MITCHELL, and TOLMAN, JJ., concur.

[No. 15988. Department One. September 14, 1920.]

THE STATE OF WASHINGTON, *on the Relation of*
H. P. McGlothern, Plaintiff, v. THE SUPERIOR
COURT FOR KING COUNTY, *Calvin S. Hall,*
*Judge, Respondent.*¹

PROHIBITION (9, 20)—WHEN LIES—JURISDICTION—PREVENTING FURTHER PROCEEDINGS—INJUNCTION. Since, under Rem. Code, §§ 1027, 1028, a writ of prohibition will not issue unless the trial court is proceeding without or in excess of jurisdiction, and then only where there is no adequate remedy either by appeal or by writ of error, the supreme court will not grant the writ to prohibit the superior court from hearing a motion to vacate a temporary injunction, though entered by consent of defendant and under circumstances that estop it from having it dissolved; since the court, having jurisdiction of the subject-matter and the parties, had jurisdiction to make an order in the premises, which order, if not appealable, is reviewable by certiorari.

¹Reported in 192 Pac. 937.

Application filed in the supreme court July 26, 1920, for a writ of prohibition to prevent the superior court for King county, Hall, J., from further proceeding in a cause. Denied.

W. R. Crawford and *Morris B. Sachs*, for relator.

Walter F. Meier, for respondent.

MITCHELL, J.—This case is before us upon the petitions or affidavit and supplemental affidavit of the relator, and the return of the respondent to an alternative writ of prohibition.

Essentially, it appears that the relator commenced an action in the superior court of King county against the city of Seattle to enjoin it from enforcing the provisions of one of its ordinances, and a resolution of the city council connected therewith, relating to the regulation and licensing of the jitney bus traffic in the city. Upon the furnishing of a sufficient bond, an emergency restraining order was issued, together with an order directing the city to show cause why an injunction, during the pendency of the suit, should not be granted. The summons and complaint and the show cause order were promptly served upon the city. On the return day of the show cause order, the city responded and, by its demurrer, appeared generally in the cause. An answer to the complaint therein was filed later. From the return day mentioned, the cause was continued from time to time, during all of which time, until on the 19th day of July, 1920, the restraining order was continued in force. On the last named date, both parties being present in court by their counsel and appearing in the cause, the superior court made and caused to be entered an injunctive order against the city, to continue until the final hearing of the cause and until the further order of the court. Within a few

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days the city served and filed, and noticed for hearing, a motion to dissolve the temporary injunction theretofore issued in the cause. The court fixed a date for hearing the city's motion, but prior to that date the application was made to this court for a writ of prohibition, upon which application an alternative writ was ordered issued and served upon the judge of the superior court.

It is alleged by the relator that, about the time of making the motion to vacate the temporary injunction, the cause, by assignment, was about ready for trial on the merits, and that counsel for the city asked for a continuance of the trial on the merits (from a date already fixed) so as to allow sufficient time to present the motion and have the temporary injunction dissolved, so that, in the event of a decision adverse to the plaintiff therein on the final hearing, the injunction against the city could not be continued in force by a supersedeas during the pendency in this court of any appeal taken by the plaintiff. It is also further alleged herein that thereupon the judge of the superior court sitting at that time, without any proper showing, and over the protest of the plaintiff, continued the hearing of the cause upon its merits until September 24, 1920, so that the city might be able in the meantime to present and obtain an order dissolving the temporary injunction. It is further alleged herein by the relator that the temporary injunction was granted and entered upon the consent of the city, in consideration of the relator, plaintiff therein, dis-advantaging himself concerning certain other proceedings pending between them relating to the same subject-matter, and also upon the plaintiff's agreeing, as he did agree, to advance the date for the final trial of that case on its merits. It is further alleged that this

relator has objected to the hearing by the superior court of the city's motion to dissolve the injunction, but that, nevertheless, a day has been fixed and the superior court threatens to, and unless prohibited will proceed to, hear the motion on its merits, without and in excess of jurisdiction, to the oppression of the relator, the plaintiff therein, against which action on the part of the superior court there is no plain, speedy and adequate remedy other than by writ of prohibition issued out of this court.

The respondent has filed a general demurrer to the affidavits, and also filed an answer and return, which, of course, contain no statement or admission as to what disposition will be made of a motion to vacate the temporary injunction when and if the same shall be presented; and which return, among other things, contains certain denials that appear to meet the allegation that the temporary injunction was consented to by the city. In this situation the relator moves this court for an order of reference to take and report back the evidence upon this controverted matter of fact; and in support of the motion tenders, *aliunde*, what purports to be a stenographic report of all that occurred between respective counsel and the court at the time of the making and entering of the temporary injunction. Counsel for the city consents in open court that the stenographic report as tendered may be considered, though disputing its materiality. But we are satisfied the motion for an order of reference must be, and it is, denied. Upon due consideration, we are convinced that the relator's affidavits, considered in their most favorable light, do not show that he is entitled to a writ of prohibition.

The parties and the subject-matter are all before the superior court by process and under general ap-

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pearances. The immediate cause of the controversy relates to an intermediate step or order in the progress of the cause which the superior court has unquestioned power and jurisdiction to hear and determine. If it be assumed that the temporary injunction was entered with the consent of the city, or rather under circumstances that estop it from having it dissolved, as is contended by the relator, then, of course, the superior court will deny the motion to dissolve it.

As applicable here, the statutes provide that the writ of prohibition arrests the proceedings of the superior court when such proceedings are without or in excess of the jurisdiction of the superior court, and may be issued by this court to that court in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. Rem. Code, §§ 1027, 1028. Under the constitution and statutes, the superior courts of this state have been given general jurisdiction. Jurisdiction means the power to hear and determine. It is the power not to hear and determine correctly, nor the power to hear and determine incorrectly, but the power to simply hear and determine; and if, in the face of all presumptions, a litigant fears an erroneous ruling, it can in no sense disturb or defeat the power of the court to hear and determine. In the progress of the cause towards the final judgment, the superior court has the jurisdiction to reconsider its orders.

In the case of *State ex rel. Griffith v. Superior Court*, 71 Wash. 386, 128 Pac. 644, it was said:

“The court had jurisdiction over the subject-matter of the order, and over the parties, and hence jurisdiction to make an order in the premises. Whether or not it made a correct order, does not affect its jurisdiction. The error, therefore, if error was committed, was one made in the exercise of competent jurisdiction, and

not one made without jurisdiction, and is not subject to correction by a writ of prohibition.”

See, also, *State ex rel. Lewis v. Hogg*, 22 Wash. 646, 62 Pac. 143; *State ex rel. Meyer v. Clifford*, 78 Wash. 555, 139 Pac. 650.

To make the writ available, conditions must be dual. It must be a case wherein the tribunal is proceeding “without or in excess” of jurisdiction, and then only where there is no adequate remedy either by appeal or by writ of error. *State ex rel. Meyer v. Clifford*, *supra*. In the case just cited, this court said:

“A writ of prohibition will not issue to review errors, either of law or fact, where the tribunal has jurisdiction. Such matters are reviewable by certiorari where there is no appeal, and the order which the court was about to make in the instant case is conceded to be interlocutory and nonappealable. Rem. & Bal. Code, §§ 1002 and 1010 (P. C. 81 §§ 1729, 1745). The words in the statute, Rem. & Bal. Code, § 1027 (P. C. 81 § 1781), ‘in excess’ of the jurisdiction of such tribunal, clearly do not mean an error either in law or fact committed in the exercise of an acknowledged jurisdiction.”

So that, if in this case it be said that, by statute, it is provided “that no appeal shall be allowed from any order denying a motion for a temporary injunction, or vacating a temporary injunction, unless the judge of the superior court shall have found upon the hearing that the party against whom the injunction was sought was insolvent” (Rem. Code, § 1716, subd. 3), it may be answered that any party feeling aggrieved in any such case is amply protected, but not by the extraordinary writ of prohibition. We have often said:

“The adequacy of the remedy by appeal, or in the ordinary course of law, is the test to be applied by this court in all applications for extraordinary writs, and not the mere question of jurisdiction or lack of juris-

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diction." *State ex rel. Miller v. Superior Court*, 40 Wash. 555, 82 Pac. 875, 111 Am. St. 925, 2 L. R. A. (N. S.) 395; *State ex rel. Godfrey v. Superior Court*, 111 Wash. 101, 189 Pac. 256.

The alternative writ heretofore issued in this case will be vacated and the proceedings in this court dismissed.

MAIN, FULLERTON, and PARKER, JJ., concur.

[No. 15758. Department One. September 14, 1920.]

THE STATE OF WASHINGTON, *Appellant*, v.
ARTHUR REESE, *Respondent*.¹

CRIMINAL LAW (29-2)—VENUE—CONSTITUTIONAL PROVISIONS—RIGHT TO TRIAL BY JURY OF VICINAGE. Under Const., art. 1, § 22, granting to accused persons the right to a speedy, public trial by an impartial jury of the county in which the offense is alleged to have been committed, one accused of crime has a right to be tried in the county in which the offense is alleged to have been committed.

SAME. Rem. & Bal. Code, § 2293, making the route traversed by a railway car, train or other public conveyance, and the water traversed by any boat, criminal districts, and providing that the jurisdiction of offenses committed on any such railway car, train or boat, or at any station or depot upon such route, shall be in any county through which such car, train or boat may pass during the trip or voyage, or in which the trip or voyage may begin or terminate, is void as in violation of Const., art. 1, § 22, guaranteeing to the accused the right to be tried in the county in which the offense is alleged to have been committed.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered December 20, 1919, granting a motion in arrest of judgment, after a trial and conviction of grand larceny. Affirmed.

Joseph B. Lindsley and *T. T. Grant*, for appellant.

¹Reported in 192 Pac. 934.

MAIN, J.—The defendant was charged by information, by the prosecuting attorney of Spokane county, with the crime of grand larceny. The trial resulted in a verdict of guilty. A motion in arrest of judgment was made and sustained. The state appeals.

The information, omitting the formal parts, is as follows:

“That on or about August 31st, 1919, on a railway train of the Northern Pacific Railroad, arriving in, and passing through, Spokane county, Washington, the said defendant, Arthur Reese, whose other or true name is to the prosecuting attorney unknown, then and there being, did then and there, wilfully, unlawfully and feloniously, take, steal and carry away one certain gold watch of the value of \$50 and one certain gold bougat watch fob of the value of \$50, the property of, and belonging to, Chas. E. Roediger, with the intent to deprive and defraud the owner thereof.”

It should be noted that, in this charge, it is not alleged that the offense was committed in Spokane county. Upon the trial it appeared from testimony that the respondent was a porter on the Northern Pacific train leaving Tacoma, Washington, on the evening of the 30th or 31st of August, 1919. The train arrived in Spokane the following morning. Among the passengers on the train was one C. E. Roediger, who occupied a berth in a sleeping car just in front of the car which was in charge of the respondent. Roediger retired about midnight, and at the time the train was near Yakima, Washington. At this time he had in his vest pocket a watch and fob. He awoke near Lind, Washington, and his watch and fob were missing. About a month later the respondent pawned the watch in the city of Spokane. Thereafter he was arrested, with the result as above indicated. The charge in this case is laid under § 2293 of Rem. & Bal. Code, which provides:

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“The route traversed by any railway car, coach, train or other public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate.”

By this statute, it is attempted to make the route traversed by a railway train a criminal district and to provide that the court in any county through which the train may pass during its trip shall have jurisdiction of any offense committed upon the train, regardless of whether, at the time the crime was committed, the train was in the county where the prosecution is attempted to be had. If this statute is constitutional, the judgment of the superior court cannot be sustained. On the other hand, if the statute is unconstitutional, the trial court ruled correctly on the motion in arrest of judgment. It should be kept in mind that this is not a case where property stolen in one county is carried by the thief into another, and in the latter county is charged with having committed an offense therein. As already pointed out, the information in this case does not charge that the offense was committed in Spokane county. Neither is it a case where an act done in one county contributes to the offense in another. The question is the constitutionality of the law under which the accused was tried and convicted. Const., art. 1, § 22, provides:

“In criminal prosecutions, the accused shall have the right to . . . a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed. . . .”

Under this section of the constitution one accused of crime has a right to be tried in the county in which the offense is alleged to have been committed. It requires no argument to show that the offense, being alleged in a particular county, the proof must show that it was committed in that county. Comparing the provisions of the statute with the requirements of the constitution, it appears that the statute goes beyond the constitutional limitation. Under the statute, the route traversed by a railway train is made a criminal district, and an offender may be prosecuted in any county in such district. Under the constitution, he can only be prosecuted in the county where the offense has been committed. In *State v. Carroll*, 55 Wash. 588, 104 Pac. 814, 133 Am. St. 1047, the court had before it a statute providing that, when property taken by burglary in one county had been brought into another county, the jurisdiction was in either county. It was there held that the statute violated Const., art. 1, § 22, which guaranteed to the accused a right to a trial in the county in which the offense was alleged to have been committed. While that case can hardly be said to be exactly in point upon the question presented upon this appeal, yet the analogy is very close. In *Corpus Juris*, vol. 16, p. 198, it is said, speaking of statutes such as the one here under consideration, that "by the weight of authority such statutes violate no constitutional provision; but the contrary has also been held." All the cases cited in the notes in support of the texts have been carefully examined and we find but three cases which discuss and decide the exact question. Two of these hold that such statutes are unconstitutional, in that they deny to the accused the right to a trial in the county in which the offense has been committed. One holds that such statutes are constitutional, though

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in the latter case there was a dissenting opinion. In *State v. Anderson*, 191 Mo. 134, 90 S. W. 95, the supreme court of the state of Missouri, in a well considered opinion, held that a similar statute was unconstitutional. The question had been before that court at prior times and its earlier decisions were reviewed and adhered to. In *People v. Brock*, 149 Mich. 464, 112 N. W. 1116, the question was before the supreme court of Michigan, and it was there held that such a statute cannot be sustained under a constitutional provision which guarantees to the accused the right to a trial in the county in which the offense has been committed. It was there said:

"It would be a startling innovation should we say that the legislature has power to subject a person charged with crime to prosecution in any one of several counties, covering a strip of territory coextensive with the length or breadth of the state, at the prosecutor's election, and yet that is what this statute authorizes if it is valid. It cannot be said that this offense was in 'contemplation of law' committed in each of said counties, as in a case where property stolen in one county is carried by the thief into another, or possibly where an act done in one county contributes to the commission of the offense in another."

In *Watt v. People*, 126 Ill. 9, 18 N. E. 340, the question was before the supreme court of Illinois and a different conclusion was there reached, though not by a unanimous court. The holding in that case seems to be influenced by the fact that the constitutional provision there being considered was less restrictive than were the similar provisions in either of the two earlier constitutions, and this fact led to the conclusion that it was the intention "to release in some degree the rigid rule formerly prevailing." As already stated, none of the other cases cited in the notes of Corpus

Juris, or in the brief, discuss or decide the question here presented. Under this state of the authorities, we are constrained to disagree with the writer of the text upon where the weight of authority lies. It seems to us that reason and authority both support the view that the statute cannot take away from an accused a right guaranteed by the constitution.

The judgment will be affirmed.

HOLCOMB, C. J., MITCHELL, PARKER, and MACKINTOSH, JJ., concur.

[No. 15891. Department One. September 15, 1920.]

JULIA M. DELLE, *Respondent*, v. LEE C. DELLE,
Appellant.¹

DIVORCE (104)—DECREE—CUSTODY OF CHILDREN—MODIFICATION. Upon granting a divorce and awarding the custody of a child, there is a continuing jurisdiction in the court to modify the decree notwithstanding it provided that the husband's custody of the child should immediately terminate in case of his remarriage; since such provision is not controlling where the welfare of the child is an issue.

DIVORCE (100)—CUSTODY OF CHILDREN. Upon an issue as to the custody of children of a divorced couple, the welfare of the children is controlling and the rights of the husband and wife are equal.

SAME (104)—CUSTODY OF CHILDREN—DECREE—MODIFICATION—EVIDENCE—SUFFICIENCY. The custody of children of a divorced couple will not be changed to a new environment where their welfare would not be advanced, because of a past and undesirable relationship between the father and a young woman acting as his housekeeper, where they had subsequently married, nor because of some disagreement as to the visits of the mother to her children; but her right to visit the children will be provided for and enforced.

Appeal from an order of the superior court for Pierce county, Fletcher, J., entered March 9, 1920, in favor of the plaintiff, modifying a divorce decree re-

¹Reported in 192 Pac. 966; 193 Pac. 569.

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specting the custody of children, after a hearing before the court. Reversed.

Charles O. Bates and Stephen J. Chadwick (Henry J. Snively, of counsel), for appellant.

Hayden, Langhorne & Metzger, for respondent.

MAIN, J.—This is an appeal from the order of the superior court modifying a previous divorce decree in so far as it relates to the custody of the two children. The appellant and respondent were married during the year 1909. On October 28, 1914, they were divorced. At this time there were two children, a girl approximately four years of age, and a boy something more than a year younger. The custody of the children was awarded to the father, the appellant, with certain provisions in the decree whereby the mother should have the right to see and visit them and have the children visit her. During the month of September, 1919, a petition was filed in the original cause by the respondent, the mother, asking that the original decree be modified and that she be given the custody of the children. The cause, in due time, came on for hearing, and resulted in an order changing the custody of the children from the father to the mother. From this order, the appeal is prosecuted by the father. Shortly after the parties were married, a Miss Dyhrman came to live with them and to make her home there as one of the family. This relation continued up to the time of the trial of the present action. After the divorce was granted, Miss Dyhrman remained in the home, was employed as a housekeeper by the appellant and took care of the children. Shortly after the appeal was taken in this case, she and the appellant were married.

The respondent moved to dismiss the appeal because there had been a cessation of the controversy, and because the appellant, by his marriage to Miss Dhyrman, had waived his right to appeal. This motion is based on a provision in the original decree which provided that, in the event the defendant in that action, the appellant here, should remarry at any time subsequent to the entering of that decree, the custody and control of the children, and each of them, should "be thereby instantly terminated; and the plaintiff shall from thenceforth be entitled to their sole care, custody and control." If property rights were involved it may be that the provision of the decree would be held controlling. The question here is the custody of the children. The parties could not, by contract, and the court could not, in an original decree, make a provision relating to the custody of the children which would be controlling upon a subsequent hearing where their custody was involved. So long as there are minor children whose maintenance and welfare are provided for in the original decree, there is a continuing jurisdiction in the court to modify that decree, having regard to their welfare. *Dyer v. Dyer*, 65 Wash. 535, 118 Pac. 634, 19 C. J. 347. In addition to this, if it should be held that the appellant, for the present, was bound by the provisions of the original decree and the custody of the children was transferred, under the repeated holdings of this court, the jurisdiction of the court being a continuing one, he would have a right to petition that the custody be again awarded to him. The question was fully tried upon the hearing from which this appeal is prosecuted, and the welfare of the children demand that the controversy be settled without unnecessarily prolonging the litigation.

The motion to dismiss the appeal will be denied.

Upon the merits, the primary question is the welfare of the children. This rule is recognized by both sides. Under the statute, Rem. Code, § 5932, the rights and responsibilities of parents to the custody and control of children, in the absence of misconduct, are equal. Any argument based upon an assumption that the father's rights are superior to those of the mother is repudiated. It will be conceded that, under the record in this case, the respondent, the mother, at this time is physically, and probably financially, able to take care of the children with the alimony allowance provided for in the original decree, in the event that the custody should go to her. It will also be conceded, and there is no word of evidence to the contrary, that the mother is a suitable person to have their custody. The children now are approximately nine and ten years of age. They have remained with the appellant since the original decree of divorce, a period of approximately five years.

Without reviewing the facts in detail, it may be said generally that these facts are conclusively established. The appellant has, where he resides in Yakima, a good, substantial home, with ample grounds surrounding it, in a good neighborhood. The children have at all times been well fed, well clothed and well housed. They are being properly brought up and attending a good school. Miss Dhyrman, now Mrs. Delle, has at all times been kind to them and the children seem to like her. In short, the children seem to have everything that is desirable for their welfare and proper bringing up, except the affectionate care and attention of the mother. Where the parents are divorced the children must go to one or the other. They must suffer the loss either of the father's directing influence or the mother's gentle care and affection; they cannot have

both. If the order of the superior court is sustained and the custody of the children transferred to the mother, they will be moved to another town, where the mother is practicing as a professional nurse. At this time the mother has no home to which to take them, but hopes to rent a house and establish a home, where an aunt of hers, a widowed lady, will manage the house and have direction of the children in her absence. It may be that, if this were the original question and the court was dealing with the question of awarding the custody of the children to one parent or the other now for the first time, considering the tender age of the children, it would be deemed best for their welfare that the custody be given to the mother. It will be recognized that the changing of the custody of the children and moving them from one environment to another, in the absence of good cause therefor, is not desirable. The record fails to show clearly the reason which prompted the trial court to order the change of custody. It may be that the trial judge thought that the children had arrived at that age where they should not be brought up in a home where the appellant was employing a young woman as a housekeeper with no other adult person residing in the house. The record shows that this method of living had given rise to some criticism. The respondent concedes, however, that the proof fails to establish any improper relations between the appellant and the housekeeper. This objection, by the marriage of the appellant and Miss Dhyrman, has been removed.

The respondent claims that the welfare of the children would be promoted by the change, first, because the general reputation of the appellant and the housekeeper is bad, and that their method of living is prejudicial to the best interests and the welfare of the chil-

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dren. It is not necessary here to determine what disposition this court would have made had the relations continued as they were at the time the order was entered. The marriage has removed the objection that their method of living was prejudicial to the interests of the children. Under the evidence in the case, it cannot be held that the general reputation of the appellant and the housekeeper was bad. It is true there was some testimony to this effect, but the overwhelming testimony is to the contrary effect. The evidence was largely given by deposition, and this court, for that reason, is in substantially as good position to weigh the testimony as was the trial court.

The respondent also claims that the children are deprived of friendly association among other children. The evidence, beyond controversy, establishes that there is no foundation for this charge; the children play with the other children of the neighborhood and there is no discrimination against them. It is further claimed that the children are being incited against the mother and that their love for their mother is being gradually and surely stilled. There is some slight evidence in the record from which it might be inferred that the appellant and Miss Dyhrman were not as diligent in keeping alive in the minds of the children their love and respect for their mother as they should have been. If either of the parents should try to teach the children disrespect for the other, this course, if persisted in, might furnish a sufficient reason for changing their custody. Let it be said that if, in the future, the appellant and his present wife attempt, either directly or indirectly, to abate the love of the children for their mother, and the cause should come here for review upon that question, this conduct will

be regarded as a serious detriment to the welfare of the children.

Viewing the whole record, after having given it the most careful consideration, we cannot but reach the conclusion that the welfare of the children will be best served by leaving them with the appellant, their father. There should, however, be made adequate provision for the children to visit their mother, and her to visit them. The respondent complains that the provision of the original decree upon these matters had not in the past been complied with. It is true that the appellant seemed to assume that he was the autocrat and that the mother, even when the children were visiting her, had no right to do such a thing as having their pictures taken without consulting him. This happened upon one occasion when the children were visiting their mother in Tacoma, and gave rise to a letter from the appellant to the respondent in which it is assumed, and in so many words stated, that she, the mother, "had no right to do what you did without first consulting me, and finding out if it was agreeable." The attitude of the appellant towards his divorced wife we unequivocally condemn. Notwithstanding this shortcoming, as already stated, the question here is the welfare of the children. While the custody of the children is to remain with the appellant, the father, there should be more adequate provision by which they can visit the mother and the mother visit them, without any suggestion of espionage on the part of the appellant or his present wife. The superior court will be directed to embody in the decree a provision covering the right of the mother to visit the children, and also provide that, during the vacations between school terms, she shall have the right to have the children visit her and remain with her for such length of time as she desires

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and can give them proper care and attention. It will be the duty of the appellant, upon the request of the respondent, to take or cause the children to be taken to her place of residence and deliver them to her at such times.

The judgment will be reversed, and the cause remanded with directions to the superior court to enter an order as herein indicated.

HOLCOMB, C. J., MITCHELL, TOLMAN, and MACKINTOSH, JJ., concur.

ON REHEARING.

[Department Two. November 29, 1920.]

PER CURIAM.—The petition for rehearing in this case concludes with the request that, in the event of its denial, the opinion, with respect to that portion thereof covering the mother's rights to have the children visit her, be amplified. The particular language to which attention is directed is "vacations between school terms." This language may have been used somewhat improvidently, and if it is not plain, it is sufficient to say that the court intended by its use that the mother should have the children during any substantial period when they were not in school, whether such period be technically between school terms or not.

We are also requested to settle the terms more definitely upon which the mother may visit the children, but in this regard we think the direction given is sufficient.

In all other respects the petition is denied.

[No. 15233. Department One. September 15, 1920.]

THE STATE OF WASHINGTON, *on the Relation of Great Northern Railway Company, Appellant, v.*

PUBLIC SERVICE COMMISSION,

*Respondent.*¹

CARRIERS (6)—REGULATION OF RATES—MILLING PRIVILEGES—DISCRIMINATION—REASONABLENESS—EVIDENCE—SUFFICIENCY. The prohibition of Rem. Code, §§ 8626-20, 8626-21, is only against discrimination which is unjust or unreasonable; and it is not unjust or undue discrimination for a railroad company to grant milling-in-transit privileges to a station at the terminus of the road involving a back haul on its own line of thirty-four miles, as against another city forty-four miles beyond the terminus, which the company reached only over a leased line at a greater operating expense.

SAME. Upon an issue as to the reasonableness of discrimination in allowing a back haul, a long haul may make it fair to grant the privilege which the road could not be compelled to grant on a shorter haul.

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered August 14, 1918, affirming an order of the public service commission compelling the relator to extend to a shipper milling in transit privileges, tried to the court. Reversed.

F. V. Brown and Thomas Balmer (A. J. Laughon, of counsel), for relator.

The Attorney General and R. M. Burgunder, Assistant, for respondent.

MACKINTOSH, J.—The Sperry Flour Company, operating a flour mill at Tacoma, initiated a proceeding before the public service commission to compel the Great Northern Railway to extend to it at Tacoma the milling in transit privileges in effect at Seattle on wheat shipped from points on the railway's lines in

¹Reported in 192 Pac. 1075.

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eastern Washington, the finished product to be delivered to points on the Great Northern Railway, north and east of Seattle. In the railway company's answer it admitted that, by its tariffs, milling in transit privileges were extended to shippers at Seattle and Everett, and it claimed that its tariff rules with respect to such privileges were just and reasonable, and therefore legal. The public service commission granted the prayer of the flour company's complaint, and upon appeal to the superior court, a final judgment was entered affirming the order of the public service commission, and from that judgment, this appeal is taken.

The facts are as follows: The Sperry Flour Company purchases its wheat at points on the appellant's railway in eastern Washington, from which it is shipped to the mill at Tacoma, and then reshipped, as the finished product, to various points on appellant's line. The appellant has established and maintained rates on wheat shipped from eastern Washington to Seattle, where there are some ten mills competing with the complainant, and by these rates these mills are permitted to mill such wheat in transit at Seattle and reship it to other points on the appellant's line at rates lower than its regular rates on the finished product, but the appellant refuses to accord the same privileges to the complainant at Tacoma, and the complainant claims that it is thereby subjected to undue, unjust and unreasonable discrimination, in that it pays higher rates on the finished product than its Seattle competitors. The milling in transit privileges are extended to shippers at both Seattle and Everett, but at no other places on appellant's line in western Washington. The appellant's line reaches Puget Sound at Everett, from which point it extends northward beyond Bellingham and southward to Seattle. From Seattle

to Tacoma the appellant operates trains over the Northern Pacific Railway's lines under trackage agreement, whereby it pays a certain price for each car moved by it. Such use is under a contract by which the operating and maintaining expenses are on the basis of the number of cars hauled on the tracks. Tolt and Sultan are points east of Everett, Sultan being an intermediate point on the appellant's main line, and Tolt on a branch line south from Monroe, a station on the main line between Everett and Sultan. Everett is distant from Seattle thirty-four miles, and Tacoma is distant from Everett seventy-five miles, through Seattle.

The milling in transit privileges extended to shippers at Seattle on shipments received in eastern Washington and milled at Seattle and reshipped to points north of Everett involve a back haul of thirty-four miles; such a privilege extended to the complainant at Tacoma would require a back haul of seventy-five miles. The through rates on eastern shipments to Tacoma is the same as through rates on shipments to Seattle and Everett. The Northern Pacific and Chicago, Milwaukee & Puget Sound Railways accord milling in transit privileges at Tacoma and Seattle on eastern shipments milled at either point, the finished product to be reshipped to points north. On the Northern Pacific lines this involves a back haul of eighteen miles, and on the Milwaukee a back haul of twenty-six miles. Both of these railroads operate lines into and through the territory north of Seattle, the Northern Pacific extending to the Canadian border, and the Milwaukee having lines through Tolt, Monroe and Everett. East of Everett on the appellant's line there is no flour mill in western Washington. There is one small mill at Everett which has not sufficient capacity to supply the

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local point or points on appellant's line north of Everett and west of Sultan. The appellant admits that the milling in transit privileges extended to Everett and Seattle are discriminatory as they may affect the complainant, and prefers the mills at those points to the complainant, but contends that such discrimination and preference are not unlawful unless the preference is unreasonable and the discrimination unjust.

The statutes (Rem. Code, §§ 8626-20, 8626-21), forbid those discriminations and preferences which give an undue and unreasonable preference or advantage to traffic under the same or substantially similar circumstances and conditions. The prohibitions of the state law are identical with those of the Federal act. U. S. Comp. Stats., §§ 8564, 8565. It must be borne in mind throughout this discussion that back haul privileges are not extended by carriers unless some peculiar condition requires it, and that, in order to furnish back haul privileges to the complainant, it would be necessary for the shipments of wheat to pass through the Seattle terminal twice.

The Federal act has been under consideration by the supreme court of the United States and by the interstate commerce commission many times. Those considerations have resulted in the establishment of the principle that preferences or advantages may be granted that are not undue or unjust or unreasonable. In *Cincinnati, New Orleans & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, the supreme court said:

“Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves com-

mon carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

In *Texas & Pacific R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, occurs the following:

"Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress. The very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that preference or advantage to any particular person, firm, corporation, or locality must not be *undue* or *unreasonable*, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act.

"The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were 'like and contemporaneous,' whether the kinds of traffic were 'like,' whether the transportation was effected under 'substantially similar circumstances and conditions.' To answer such questions, in any case coming before the Commission, requires an investigation into the facts; and we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not

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'unjust.' Some charges might be unjust to shippers—others might be unjust to the carriers. The rights and interests of both must under the terms of the act, be regarded by the Commission.

"The third section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality; and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law, but of fact. The mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act."

In *Wight v. United States*, 167 U. S. 512, Justice Brewer, speaking for the court, says:

"It was the purpose of the action to enforce equality between shippers, and it prohibits any rebate or other device by which the shippers, shipping over the same line, the same distance, under the same circumstances, are compelled to pay different prices therefor."

Interstate Commerce Commission v. Baltimore & Ohio R. Co., 145 U. S. 263, holds:

"The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. . . . It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable. . . . Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust. . . . In order to constitute an unjust discrimination under section 2, the carrier must charge or receive directly from one person a greater or less

compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but, in either case, it must be for a 'like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions.' . . . 'To come within the inhibition of said sections, the differences must be under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. . . .'

Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, announces the principle in this language:

"This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

East Tennessee etc. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, holds:

"The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers. And special attention was directed to this view in the *Behlmer* case, in the passage which we have previously excerpted. To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it cannot be that the availing of this right is the cause of the preference, and especially is this made clear in the case supposed, since it

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is manifest that forbidding the carrier to meet the competition would not remove the discrimination.

"The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and noncompetitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the non-competitive point may apparently engender a discrimination against it."

To the same effect, see *Interstate Commerce Comm. v. Diefenbaugh*, 222 U. S. 42; *In re Import and Domestic Rates—Clay*, 39 I. C. C. 132; *Douglas & Co. v. Illinois Cent. R. Co.*, 31 I. C. C. 587; *Empson Packing Co. v. Colorado Midland R. Co.*, 22 I. C. C. 268; *In re Investigation etc. Rates on Meats*, 22 I. C. C. 160; *Royal Milling Co. v. Great Northern R. Co.*, 52 I. C. C. 151; *Board of Trade of Kansas City v. St. Louis & S. F. R. Co.*, 32 I. C. C. 297.

"It is not within the power of this Commission to equalize economic conditions, or to place one market in a position to compete on equal terms with another market as against natural advantages." *Baltimore Chamber of Commerce v. Baltimore & Ohio R. Co.*, 22 I. C. C. 596.

"It is well settled that it is not the province of the Commission to make adjustments which will offset the natural advantages or disadvantages of one locality as compared with another." *Harrisonburg Milling Co. v. Ann Arbor R. Co.*, 52 I. C. C. 63.

"An arrangement of the kind here sought would undoubtedly be of considerable value to the complainants, but upon this record we cannot find that the

refusal of defendants to provide therefor is unreasonable, unjustly discriminatory, or unduly prejudicial, and consequently there is no justification for our requiring its establishment. The complaint in this case must therefore be dismissed." *Grain & Hay Exchange etc. v. Pennsylvania Co.*, 32 I. C. C. 409.

"Where unjust discrimination is alleged against one point and undue preference to another and the same rates are demanded as a remedy therefor, the evidence should show that the circumstances and conditions with respect to transportation at the respective points are substantially the same." *Eagle Distillery Inc. v. Louisville, H. & St. L. R. Co.*, 32 I. C. C. 195.

"When rates are attacked as unduly prejudicial and an equalization of rates is requested, it should be shown that the transportation conditions existing in the localities under comparison are substantially similar. In the absence of such proof a finding of discrimination cannot be predicated solely on a disparity of rates." (Syllabus) *Chamber of Commerce of Houston v. International & G. N. R. Co.*, 32 I. C. C. 247.

See, also, *Stock & Sons v. Lake Shore & M. S. R. Co.*, 31 I. C. C. 150; *Middletown Car Co. v. Pennsylvania R. Co.*, 32 I. C. C. 185; *Empire Coke Co. v. Buffalo & S. R. Co.*, 31 I. C. C. 573.

"Shippers are not entitled as matter of right to mill grain in transit and forward the milled product under the through rate in force on the grain from the point of origin to the place of ultimate destination; on the contrary, milling in transit is a special privilege for which extra compensation is usually exacted by carriers and which is only permitted by them under prescribed terms and conditions." (Syllabus) *Diamond Mills v. Boston & M. R. Co.*, 9 I. C. C. 311.

The complainant places a great reliance upon the decision of this court in the case of *State ex rel. Northern Pac. R. Co. v. Public Service Commission*, 95 Wash. 376, 163 Pac. 1143. That case determined that the commission had a right to hear a complaint such as is

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presented in this case, but does not sustain the result arrived at by the commission in this case. The Prosser case involved the milling in transit privileges, but no question of back haul was involved. The court held that Prosser, being an intermediate point, was entitled to the same milling in transit privileges as was North Yakima, a point beyond Prosser, and that both Prosser and North Yakima were similarly situated. The fact that it was a milling in transit case has nothing to do with the decision of that case. Prosser, on account of its location between the point of origin and the point of discharge of the shipment, and being similarly situated as was Yakima, was entitled to the same rights. In the case before us, Tacoma is not an intermediate point and is only entitled, if at all, to the extension of the milling in transit tariff as a privilege and not as a right, on the ground that it would be unjust and unfair not to accord it to Tacoma when it has been granted to Seattle. Nor are the Seattle mills entitled to the tariff as a matter of right, and it might be that the privilege would be withdrawn on the complaint of someone adversely affected; but that matter is not before us, and the fact that the privilege has been extended to Seattle does not authorize its compulsory extension to other localities as matters of right, where such other localities are not similarly situated, or where the extension would be unfair or unjust to the railway company, but only where the refusal of such extension would be unfair or unjust to the unfavored locality.

The Great Northern Railway has no line from Seattle to Tacoma, and for each car which it moves between those points it must pay to the lessor of the line over which it operates. From Everett to Seattle it owns and operates its own line, and in addition to the

back haul from Everett to Seattle being not half as great as from Everett to Tacoma, it has a right to take into consideration the fact that, on the former, the expense to the railroad company is not nearly as great as it would be if it were compelled to make the longer back haul, not only by reason of extra distance, but by reason, as well, of not being the owner of the line over which the longer back haul must be made. The fact that Seattle, Everett and Tacoma may receive the same terminal rates from shipments east does not establish that they are physically identically situated as related to all transcontinental roads; the fact being that, on the Great Northern Railway line, they are not physically identically or similarly situated.

The cases cited by complainant are similar to the Prosser case, where, on direct line hauls, or out of line hauls, intermediate stations similarly situated have been granted the same privileges which have been extended by the companies to points farther along the line, but in none of these cases has the court held that back haul privileges must be given to a point reached by the road either on its main line or through traffic arrangements with other lines, where that privilege has been granted to one or more points on its line.

As a matter of fact, the instant case is quite the contrary to the Prosser case. In the Prosser case, an intermediate point was seeking the same privileges which had been granted to a point further along the line. In the instant case, Seattle is the intermediate point, and Tacoma, the point further along the line, is asserting it must have the same privilege as the intermediate point has, although it involves an additional haul of forty-four miles to Tacoma and forty-four miles back to Seattle. The refusal of this privilege cannot be said to be unjust or unfair. If the privilege

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had been granted by the railroad company to the mill at Tacoma and the privilege was being attacked by some shipper along the line, the court might hold it was not unjust and unfair to the other shipper, the railroad having granted it. But here the complainant is seeking to compel the railroad company to grant the privilege, which will not be done unless the privilege already granted to Seattle results in unfair, unjust and unreasonable discrimination.

“We think, therefore, that we may treat the question then as one of first impression; and in doing so, it remains to inquire whether there is a just cause for the discrimination of which complaint is made. By the section of the Public Service Commission law above quoted [Rem. Code, § 8626-21], carriers are forbidden to make or give undue or unreasonable preferences or advantages to any person, or to any locality, or to any particular description of traffic. This means that a community is entitled to something more at the hands of the carrier than a mere reasonable rate, for rates must not only be reasonable in and of themselves, but they must be relatively reasonable; the duty imposed is to give equal treatment to all shippers, whatever their relative situation so long as the differences do not unequally affect the carrier. Carriers are not, of course, compelled to equalize natural disadvantages; such, for example, as arise from unequal length of haul, cost of production of the articles shipped, or the like; the prohibition only militates against discrimination where the conditions are like or similar. As we have said, there is no structural or operative difference which would favor a haul from Seattle to the shipping points named over a haul from Tacoma to the same points. Indeed, the differences, if any exist, lie in favor of Tacoma, as the haul from that place to the points named is slightly less in distance than is the haul from Seattle.” *Public Service Commission ex rel. Transportation Bureau etc. v. Northern Pac. R. Co.*, 77 Wash. 635, 138 Pac. 270.

The court recognizes that the prohibition is against discrimination where conditions are like or similar, and the facts in this case show that conditions are not like or similar, and that to compel the railroad company to furnish free transportation on a great many cars annually from Tacoma to Everett would entail a haul of 150 miles on each car taken to Tacoma, the contents of which would be milled and shipped back to points north of Everett. This unequal length in haul is a natural disadvantage so far as Tacoma is concerned with reference to the Great Northern Railway Company, and under the Tacoma rate case, the company is not compelled to eliminate all consideration of that natural disadvantage.

Chamber of Commerce of Newport News v. Southern R. Co., 23 I. C. C. 345, considered the question of Newport News and Norfolk, as related to the matter of tariff, and which are only twelve miles apart. The commission held that, the distance being so small, these two points had practically the same natural advantages.

The complainant further contends that this back haul from Tacoma is not unreasonable, for the reason that the appellant voluntarily created a back haul of the same distance on wheat shipped from Montana. In the first place, the complainant is not in position to complain of this discrimination as being unfair; for the discrimination, if any, is against the eastern Washington shippers, who are not before the court, and, in the second, it may be that, on account of extra compensation received by the railroad company by virtue of the longer haul, it was fair to grant a privilege which it would not be compelled to grant on a shorter haul for which it receives less compensation.

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The complainant also questions the privilege which is granted to Seattle mills to ship not only to points north, but to Sultan and Tolt. Both these points are upon the line of the Great Northern Railway, and what has been said heretofore applies to the right of the railroad company to extend the privilege of the haul from Seattle to these points.

Upon the whole record, we are not satisfied that the complainant has established that the preference given to Seattle millers is an unreasonable one, or the discrimination unjust. Therefore the tariff is not unlawful, and the order of the public service commission will be vacated, and the judgment of the superior court reversed.

HOLCOMB, C. J., MAIN, MITCHELL, and PARKER, JJ.,
concur.

[No. 15482. Department One. September 15, 1920.]

THE CITY OF SPOKANE, *Respondent*, v. CHARLES DALE,
Appellant.¹

CRIMINAL LAW (259)—TRIAL—INSTRUCTIONS—ASSUMING FACTS. In a prosecution for the violation of an ordinance, an instruction that accused would be guilty of "transporting liquor", within the meaning of the ordinance, if the jury believed that he hired and had control of a taxicab in which the suit cases containing liquor were carried, is prejudicial error in that it assumes the article transported was intoxicating liquor and also that the suit cases were carried and taken by the defendant.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 24, 1919, upon a trial and conviction of violating an ordinance. Reversed.

¹Reported in 192 Pac. 921.

W. C. Donovan and *Geo. H. Armitage*, for appellant.
J. M. Geraghty and *Arthur L. Hooper*, for respondent.

MITCHELL, J.—Appellant was tried and convicted in the superior court of Spokane county of the crime of transporting intoxicating liquor in the city of Spokane in violation of a city ordinance. From judgment and sentence pronounced upon a verdict of guilty, he has appealed.

It appears that the appellant hired a limousine and was taken therein to the Union railway station in the city. On alighting, he talked a few minutes with two persons, whereupon all three went into the station building and shortly came out, the two other persons carrying a suit case and two hand bags, which were placed by them in the body of the limousine. The appellant got in the car on the seat with the driver and was taken to an apartment house on Washington street, several blocks from the railway station. After stopping in an alleyway at the side or rear of the apartment house, appellant was arrested while standing by the open door of the car, and the suit case and hand bags, which were found to contain intoxicating liquor, were seized by the officer.

After all the testimony had been taken, the court instructed the jury, in the course of which he set out in full that portion of the ordinance regulating the transporting of intoxicating liquors in the city which it was charged had been violated by the appellant. While the attorney for the appellant was addressing the jury, a controversy arose, upon the objection of the city's attorney, over the manner of the argument as to what constituted the transportation of intoxicating liquor. In the presence of the jury, the court said:

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“Well, if I had thought that the question could arise, I would have incorporated an instruction to the jury upon the meaning of that word. I shall reduce to writing an additional instruction upon that question, and shall read it to the jury before the argument is concluded, the substance of which will be, gentlemen of the jury, that if you should find from the evidence in this case that the defendant had the direction or control of the taxicab there in going from the station to this point on Washington street, that, under the law, he would be transporting the suit cases and grips and their contents.”

An exception was taken by counsel for the appellant.

The record is not clear whether it was before or after the conclusion of the argument of appellant's counsel that the court prepared and submitted to the jury an instruction in writing, as follows:

“Upon the meaning of this word ‘transport,’ ladies and gentlemen, I instruct you that if you believe that the defendant had hired a taxicab, or had the control or direction of the taxicab in which the suit cases containing liquor were carried and taken by the defendant, or under his direction, from the Union Station to the apartments on Washington street, that he would be transporting liquor within the meaning of the city ordinance.”

Due and proper exception was taken to the giving of this instruction.

The giving of the last instruction is assigned as reversible error. It is plain from the clear import of the language that the court, in defining the word “transport” as it is used in the city ordinance, went beyond and took for granted or assumed that the article transported was intoxicating liquor, and also that the suit cases containing the intoxicating liquor were carried and taken by the defendant, or under his direction, from the Union station to the apartment house on Washington street. Both assumptions related to mat-

ters of fact which had been put in issue by appellant's plea of not guilty, and were for the determination of the jury. The language of the court relating to those matters of fact violated Const., art. 4, § 16, viz.: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

The error was prejudicial and warrants a reversal. The judgment is reversed, and the cause remanded with direction to grant a new trial.

HOLCOMB, C. J., PARKER, MAIN, and MACKINTOSH, JJ., concur.

[No. 15751. Department One. September 15, 1920.]

JOHN M. SNIDER, *Appellant*, v. JOSEPH WRIGHT,
Respondent.¹

APPEAL (418)—REVIEW—FINDINGS. Where, upon a direct conflict of evidence, the trial court had the advantage of observing the witnesses, weight will be given to its findings, which will not be disturbed unless the evidence preponderates against them.

COSTS (8)—PREVAILING PARTY. Where, upon breach of a lease contract, the amount of damages allowed to the defendant was in excess of those found against him, it carried the costs in his favor.

COSTS (50)—TAXATION—SERVICE AND FILING. The filing of a cost bill after announcement of the decision but before the entry of judgment instead of ten days thereafter, is not prejudicial or ground for striking the cost bill.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered August 13, 1919, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

¹Reported in 192 Pac. 923.

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Samuel P. Weaver (*S. H. Boyles*, of counsel), for appellant.

John Salisbury, for respondent.

MITCHELL, J.—In January, 1916, the defendant, Joseph Wright, as party of the first part, by a written contract, leased to the plaintiff, John M. Snider, party of the second part, the east half of section 13, township 20, north, range 40, E. W. M., and the northeast quarter of section 18, township 20, north, range 41, east W. M., in Whitman county, for the years 1916, 1917 and 1918, the compensation therefor being a part of the crops. It will be noticed that the two tracts are half a mile apart. About the time of the surrender of the lands, in December, 1918, the plaintiff sued to recover, among other things, for the plowing in May, 1918, of one hundred and five acres in the smaller tract, alleging that the work was done at the request of the defendant. In his answer the defendant denied the land was plowed at his request, and cross-complained to recover damages for the failure of the plaintiff to raise a crop on the one hundred and five acres during the year 1918. The case was tried to the court without a jury. Findings were made in favor of the plaintiff for the plowing, and against him for his failure to grow a crop on the one hundred and five acres in the year 1918. Plaintiff's motion for a new trial having been denied, judgment was entered upon the findings and conclusions. Plaintiff has appealed, claiming the amount allowed for the plowing is inadequate, and that any damages against him for failure to cultivate the one hundred and five acres is wholly unwarranted.

As to the damages allowed the respondent, the only provisions of the lease that have any bearing are as follows:

“All work, tools and equipment necessary to carry out the terms of this lease in first class, farmer-like manner, and in proper season therefor, including seed, shall be done and furnished at the expense of the second party. Second party is to sow to grain such parts of said lands as are fit therefor. . . . Second party agrees to plow, summer-fallow and harrow 290 acres during the summer of 1916.”

About two hundred and ninety acres were summer-fallowed in 1916, thereafter sowed to wheat, and a crop harvested in the year 1917. This cultivated area consisted of one hundred and five acres in the smaller tract and one hundred and eighty-five acres in the larger one. In the fall of 1917 and early part of 1918, practically the same one hundred and eighty-five acres were plowed and sowed to wheat, producing a harvest in 1918. But the one hundred and five acres was not plowed until May, 1918, too late to sow for that year's harvest. The appellant sought to excuse himself from sowing the one hundred and five acres for a crop for the year 1918 by claiming that, in the fall of 1917, it was too dry for plowing and that the respondent told him not to do any plowing, that it was too dry. The respondent denied making any such statement, and testified that, at all times, he stood upon the terms of the written lease. It is an undisputed fact that, in the fall of 1917 and early part of 1918, the appellant did plow the land on the larger tract, and besides, that fall he plowed land he had gotten from one Twohey, which land adjoins on the east the lower half of the larger tract of the respondent and corners with the quarter section upon which is situated the one hundred and five acres. There is a lot of testimony in the case from qualified witnesses, both for and against the proposition, that good, farmer-like operations required the raising of a crop of wheat on the one hundred and five

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acres in the year 1918, and that the seasons during the fall of 1917 and early in 1918 were favorable for the preparation of the ground for spring sowing, as was done in the case of the larger tract.

The trouble with appellant's course of farming was not as to the manner of cultivating, nor whether he should have plowed in the fall of 1917 or early part of the year 1918, so as to grow a crop in 1918, but that he did not grow a crop at all on the one hundred and five acres that year. Whether the one hundred and five acres were fit under proper, farmer-like treatment for the raising of a crop in 1918, according to the accepted manner of wheat growing in that section as influenced by the seasons as they actually happened, were matters of fact upon which there was a conflict of evidence. The trial court found, upon all the evidence, it was the duty of the appellant to have raised a crop on the one hundred and five acres in 1918. The trial judge has a marked advantage in determining facts. He has the opportunity of observing the manner and demeanor of the witnesses while testifying, their apparent candor or lack of it, and the force and value of what they say. We are not so fortunate as we read the pages of the testimony; hence the established rule of giving weight and respect to the findings of the trial court, which will not be disturbed unless the evidence preponderates against those findings. In this case the record has been examined, and, in our opinion, the evidence preponderates in favor of the finding made upon this subject.

As to the second assignment, it is similar in principle. By not appealing, the respondent appears content with the judgment to pay for the plowing. Out of a decided conflict in the evidence as to the reasonable value of the plowing, the trial court fixed the

amount thereof. From an examination of the record we are satisfied the finding is supported by the preponderance of the evidence. The amount of damages allowed the respondent, being in excess of those found against him, carried the costs in his favor.

Error is charged by the appellant for the refusal of the court to strike the whole cost bill, which was filed before the judgment was entered, rather than within ten days thereafter. It appears that, after the court orally announced his opinion, the respondent prepared his cost bill at the same time he did findings and conclusions, all of which were served and filed a few days before the findings and conclusions were signed upon a noticed motion therefor. We cannot see how appellant was prejudiced, for, from the date of the service and filing of the cost bill, it was at all times, including the ten days after entry of the judgment, on file in the case. The situation is similar to that in the case of *Kane v. Kane*, 35 Wash. 517, 77 Pac. 842, and must be decided against the appellant.

Judgment affirmed.

HOLCOMB, C. J., MACKINTOSH, PARKER, and MAIN, JJ., concur.

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[No. 15922. Department One. September 15, 1920.]

GREAT WESTERN MOTORS, INCORPORATED, *Appellant*, v.
GEORGE J. HIBBARD, *Respondent*.¹

EVIDENCE (60)—SIMILAR TRANSACTIONS—FRAUD—GENERAL SCHEME. Upon an issue as to fraud in the sale of an automobile to defendant by plaintiff by misrepresenting the year of the car, evidence that plaintiff had sold the same car to witness by making similar false representations is inadmissible to prove plaintiff's fraudulent intent; inasmuch as proof of fraudulent intent was not material or essential to hold plaintiff liable for positive misrepresentations of matters of fact.

SAME (211)—OPINION EVIDENCE—COMPETENCY OF EXPERTS—VALUE. A witness who had been in the business of selling and buying automobiles for twenty-two years, and was familiar with Paige cars of 1917 and 1918, is competent to testify as an expert as to their value.

DAMAGES (114)—ASSESSMENT—EVIDENCE—EXPENSES INCURRED—REASONABLE VALUE. Error cannot be predicated upon the allowance of \$200 for repairs to an automobile because the only paid bill in evidence was for but \$12.15, where the respondent testified without objection to other payments made by him, and there was no specific objection that the reasonable value of the repairs was not shown.

Appeal from a judgment of the superior court for King county, Jurey, J., entered February 28, 1919, upon the verdict of a jury rendered in favor of the defendant, in an action in replevin. Reversed.

Dan Earle, for appellant.

Flick & Paul, for respondent.

MITCHELL, J.—On July 29, 1918, the plaintiff sold a Paige automobile to the defendant under a conditional bill of sale contract. After making several payments, the defendant refused to make other payments, whereupon the plaintiff commenced this action in replevin and took the automobile into its possession. The material allegations of the complaint were denied by an-

¹Reported in 192 Pac. 958.

swer, and by way of further defense and cross-complaint, the defendant alleged he bought the car upon the representations of the plaintiff that it was new, a 1918 model, and in excellent mechanical condition; that the representations were made to induce him to purchase; that the representations were false and fraudulent in that it was a 1917 model, that it was a second-hand car, and that its mechanical condition was poor, requiring the expenditure of approximately \$220 to put it in proper order. The cross-complaint further alleged the taking of the car by plaintiff at the commencement of the suit, and that payments already made, together with the cost of repairs, amounted to \$1,493, in which sum judgment against the plaintiff was demanded. The reply denied the allegations of the cross-complaint and further alleged the conditional bill of sale contract, failure to pay, forfeiture, and re-taking the automobile by a writ of replevin at the commencement of the action. The trial resulted in a verdict and judgment in favor of the defendant in the sum of \$1,493. A motion for a new trial having been denied, the plaintiff has appealed.

First, it is claimed the court erroneously admitted certain evidence given by one Daverso on behalf of the respondent. He testified that he purchased this same automobile from the appellant prior to the date of the sale to respondent. He was then asked what the appellant told him as to the model of the car and whether or not it was new. An objection that it was irrelevant and immaterial and introduced a new issue was overruled by the court. The witness answered he was told it was a new 1918 car. It appears that this evidence was admitted for the purpose of showing fraud and deceit; that is, the intent with which respondent claimed similar representations were made to him.

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This was respondent's theory through the whole case; and in support of that theory and of the evidence referred to, relying upon *Stack v. Nolte*, 29 Wash. 188, 69 Pac. 753; *Yakima Valley Bank v. McAllister*, 37 Wash. 566, 79 Pac. 1119, 107 Am. St. 823, 1 L. R. A. (N. S.) 1075; and *Ryan v. Dowell*, 86 Wash. 76, 149 Pac. 343, it is contended for the respondent,

"First; that, where motive and intent or knowledge are vital elements in the proof in an action, other transactions showing such knowledge and intent or similar motive are permissible;" and

"Second; that, where there is a scheme to defraud, the practice of such scheme in other instances would be usable to show the possible use of the scheme in the instance at bar."

There is evidence in the case to show that a new car of the 1918 model was worth several hundred dollars more than a new car of the 1917 model, at the date of the sale to the respondent. The car that was sold was manufactured in 1917. This is not denied by the appellant, who claims the Paige car is not designated by the year of its manufacture, but by a name such as Linwood, Stratford, etc., and that it did not represent to the respondent that the car sold was a 1918 model, but, on the contrary, told him it had been on hand all the winter prior to the sale.

But what difference it could make to the respondent as to whether or not appellant knew better, or intended to deceive, it is difficult to perceive. Had the appellant, through its agent, candidly mistaken the year of the manufacture of the car and that it was unused, and nevertheless misled the respondent in those respects in consummating the sale, under circumstances entitling him to recover, the resulting damage to him would have been the same as that complained of in this suit.

The case of *Hanson v. Tomkins*, 2 Wash. 508, 27 Pac. 73, was a suit upon a promissory note. The answer admitted the execution of the note and alleged want of consideration; that plaintiff sold defendants a tract of land, and that the note was given as part of the purchase price thereof; "that plaintiff, intending to cheat the defendant and codefendant, falsely and fraudulently represented to them that said lot 2 contained $36\frac{1}{2}$ acres; and that, wholly and solely relying on the said fraudulent and false representations of plaintiff, defendant and codefendant, . . . signed the said note." The trial court instructed the jury that if they did find a discrepancy of ten acres in the tract, "you must still find a verdict for the plaintiff, unless you further find by a preponderance of the evidence that the plaintiff knew at the time he made such representations that the same were false, and made them with intent thereby to deceive the defendants, if the mistake (if you find there was a mistake) was a mutual one, and innocently made by the plaintiff, he cannot be charged therefor in this action." Concerning the instructions, this court said:

"This instruction was plainly erroneous. If the defendants relied upon the representations of the plaintiff, and were led to believe by such representations that lot 2 contained $36\frac{1}{2}$ acres, when in fact it only contained $26\frac{1}{2}$ acres, and were induced by such representations to purchase said lot as a lot of $36\frac{1}{2}$ acres, it makes no difference whether plaintiff knew such representations to be false or not, he is liable. If he knew the lot did not contain $36\frac{1}{2}$ acres, and represented to defendants that it did, he would be guilty of fraud and deceit; but if he did not know it, and believed that the representations he made were true, and defendants, acting upon such representations, were damaged because it eventuated that they were not true, the liability of the plaintiff would be the same. In neither case will

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he be allowed to retain the benefit flowing from his misrepresentation. Mr. Justice Story thus states the rule: 'Whether a party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false.' 1 Story, Eq. Jur., § 193, and note. See, also, *Page v. Bent*, 2 Metc. (Mass.) 371; *Stone v. Denny*, 4 Metc. (Mass.) 151; *Milliken v. Thorn-dike*, 103 Mass. 382; *Bennett v. Judson*, 21 N. Y. 238; *Litchfield v. Hutchinson*, 117 Mass. 195. In fact this view of the law is so well established that we think it not necessary to comment further upon it."

The rule was followed in *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205; *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559, 107 Am. St. 880, and *West v. Carter*, 54 Wash. 236, 103 Pac. 21, in which last named case it was repeated:

"And this is the just theory, for the result to the party who is deceived is exactly the same whether the intention of the party upon whose representations he relied was fraudulent or not."

While it is true the above cases from this court related to real estate transactions, the same rule applies in cases of sales of personal property.

In keeping with the rule, and because the element of knowledge or intent to defraud is not essential in this kind of a case, this court, in *McKay v. Russell*, 3 Wash. 378, 28 Pac. 908, 28 Am. St. 44, held that, in an action to recover money paid upon a contract for the sale of real estate, on the ground that the sale was procured by fraudulent representations, it is inadmissible to show that, in a similar transaction prior thereto, the defendants had made like misrepresentations to another party. In that case, after declaring, "the affirm-

ative rule is that collateral facts are inadmissible," the court adopts Mr. Greenleaf's view of what is termed exceptions to the rule, as follows:

" 'In some cases, however, evidence has been received of facts which happened before or after the principal transaction, and which had no direct or apparent connection with it; and therefore their admission might seem, at first view, to constitute an exception to this rule. But those will be found to have been cases in which the knowledge or intent of the party was a material fact, on which the evidence, apparently collateral and foreign to the main subject, had a direct bearing, and was, therefore, admitted.' "

If in a given case, such as we find this to be, it is unimportant to show knowledge or intent in establishing a cause of action, it is manifestly dangerous, and insidiously unfair to an adversary, to introduce evidence of prior independent conduct for the purpose of convincing a jury that the principal transaction—the one upon which the trial is had—was prompted by an intention to cheat and defraud.

The kindred subject, suggested by respondent's argument and authorities, of a scheme to defraud, which embraces *scienter*, motive and intent, is in no way involved in the issues in this case; nor is there any proof or element of conspiracy. The objection to this testimony of the witness Daverso should have been sustained, and we are satisfied that the admission of it was prejudicial and constituted reversible error.

Next, it is claimed the court erroneously admitted, over objections, the testimony of a witness for the respondent as to the values of 1917 and 1918 Paige cars. The contention is, the witness did not qualify as an expert. Upon examination and cross-examination as to his qualifications, he testified that, for twenty-two years (the last fourteen in Seattle), he had been en-

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gaged in the business of buying, selling and repairing automobiles and was familiar with Paige cars of 1917 and 1918; that he had conducted his business in his own independent sales rooms; that he had bought and sold automobiles for other people; appraised and priced them and everything in that line. We are satisfied, upon such showing, there was no error in allowing him to testify on the subject of values.

It is assigned that the court erred in denying appellant's motion for a directed verdict. The record convinces us the case was one for the jury upon the three questions, viz., representations as to the year of the manufacture of the automobile, whether or not it was new or second-hand, and its mechanical condition at the time of the sale.

Lastly, it is argued there was error in the assessment of the amount of recovery. Among other items, respondent sued for \$220, alleged to have been paid for necessary repairs. As the verdict and judgment were for the full amount demanded in all particulars, it necessarily included \$220 for repairs. It is contended that the only bills paid, presented by respondent to substantiate his claim, amounted to \$12.05. But counsel overlooks the fact that the respondent testified, without any objections, there were other payments for repairs, and that altogether they amounted to \$220. If it is insisted that the reasonable value of the repairs alleged to have been necessarily made is the test, and not the amount paid therefor, the appellant is not in a position to complain. In the case of *Brown v. Blaine*, 41 Wash. 287, 83 Pac. 310, it is said:

"It seems to us that the amount paid would, in any event, be some evidence of the reasonable value of the services rendered, and that, if it was not sufficient evidence, that was a matter which should have been presented to the consideration of the jury."

In the later case of *Dahlstrom v. Northern Pac. R. Co.*, 98 Wash. 390, 167 Pac. 1078, it is stated that the specific reason that the reasonable value is the proper inquiry must be pointed out to make an objection sufficient.

For the reasons given in considering the first assignment of error, the judgment is reversed and the cause remanded with direction to grant a new trial.

HOLCOMB, C. J., PARKER, MAIN, and MACKINTOSH, JJ.,
concur.

[No. 15901. Department Two. September 15, 1920.]

E. W. COLE, *Plaintiff*, v. WASHINGTON MOTION PICTURE
CORPORATION, *Respondent*, LAURENCE TRIMBLE,
Appellant.¹

APPEAL (165)—NOTICE—PARTIES—SERVICE—UPON WHOM TO BE MADE. Upon the disallowance of a claim of preference over other creditors of an insolvent corporation, creditors who appeared at the hearing and are adversely affected, are necessary parties to an appeal from the order of disallowance, necessitating the dismissal of the appeal where notice of appeal was served only upon the receiver.

SAME (218)—PARTIES ENTITLED TO NOTICE—SERVICE ON RECEIVER—SUFFICIENCY. Under Rem. Code, § 740, defining a receiver, he is but an arm of the court, and he represents creditors of the insolvent estate only to the same degree that the court represents them, and service upon him of notice of appeal by one creditor is not service upon other creditors who appeared and were adversely affected by the appeal.

APPEAL (165, 218)—NECESSARY PARTIES—NOTICE. Where various creditors appeared and filed claims in the matter of the receivership of an insolvent corporation, an appeal cannot be taken from the order on the claims by serving notice on the receiver alone, since the purpose of the statute requiring all persons appearing to be served is to prevent separate appeals.

¹Reported in 192 Pac. 972.

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Opinion Per FULLERTON, J.

Appeal from an order of the superior court for Spokane county, Oswald, J., entered January 27, 1920, in receivership proceedings, after a hearing before the court. Appeal dismissed.

Samuel R. Stern, for appellant.

Horace Kimball and Zent & Jesseph, for respondent, to the point that service of notice of appeal must be made upon all of the adverse parties in order to confer jurisdiction upon the appellant, cited: *Seattle Trust Co. v. Pitner*, 17 Wash. 365, 49 Pac. 505; *Raymond Co. v. Little Falls Fire Clay Co.*, 72 Wash. 209, 130 Pac. 93; *Robertson Mortgage Co. v. Thomas*, 63 Wash. 316, 115 Pac. 312; *State v. McDonald*, 128 Pac. (Ore.) 835; *Mogelberg v. Calhoun*, 94 Wash. 662, 163 Pac. 29; *Glenn v. Aultman & Taylor Mach. Co.*, 30 Idaho 727, 167 Pac. 1163; *Pierce v. Commercial Inv. Co.*, 31 Wash. 655, 72 Pac. 473; *Long Bell Lumber Co. v. Gaston*, 78 Wash. 598, 139 Pac. 641; *McKay v. Stephens*, 81 Wash. 306, 142 Pac. 662.

FULLERTON, J.—The defendant, The Washington Motion Picture Corporation, was, at the suit of plaintiff, E. W. Cole, adjudged insolvent, and the respondent, F. K. McBroom, appointed receiver of its property, with power to wind up its affairs. The receiver qualified as such, proceeded to execute the trust, and in due time filed with the court appointing him a report showing his doings as such receiver. It appeared from the report that the sums received from the sales of the assets of the corporation were insufficient to satisfy in full the legitimate claims of its creditors. It further appeared therefrom that certain of the creditors claimed as general creditors, and that others claimed as preferred creditors, and certain of them in each

class claimed in sums in excess of the amounts the receiver found to be justly due.

On the filing of the report, the court fixed a day for a hearing thereon, and directed that the receiver give notice to the creditors of the corporation of the time and place appointed. At this hearing a number of the creditors appeared and not only supported their own claims, but contested the claims of others. At the conclusion of the hearing, the court entered a written order in which it recited the appearances at the hearing, found who were creditors of the corporation entitled to share in the fund derived from the sale of its property, the amounts due the several creditors, who were preferred and who were general creditors, and in which it directed the disposition the receiver should make of the funds and property in his hands.

Among the creditors appearing at the hearing whose claim was contested was Lawrence Trimble. He had filed a claim for \$5,215.39, claiming to be a preferred creditor in that amount. The receiver found his claim excessive in the sum of \$2,550, and as to the remainder, found that he was a preferred creditor only to the extent of \$100 thereof. The allowance of the claim in any sum was contested by other creditors. The court, however, approved the recommendations of the receiver, and directed that the claimant share as a general creditor in the sum of \$2,569.39, and as a preferred creditor in the sum of \$100. The claimant sought to appeal to this court from the order in so far as it affected his interests, naming the receiver as respondent on the appeal and serving his notice of appeal upon the receiver only.

The receiver moves to dismiss the appeal on the ground that necessary and interested parties appearing in the proceeding were neither made parties to the appeal nor served with notice thereof.

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The code (Rem. Code, § 1719), provides that an appeal may be taken by giving notice in open court at the time the judgment or order appealed from is rendered or made, or by serving written notice on the prevailing parties within the time elsewhere limited for taking appeals. It is further provided (Id., § 1720) that

“When the notice of appeal is not given at the time when the judgment or order appealed from is rendered or made, it shall be served in the manner required by law for the service of papers in civil actions and proceedings, upon all parties who have appeared in the action or proceeding. . . .”

Construing these statutes, this court has held that the object and purpose of the legislature was to require all interested parties to jointly prosecute their appeals and cross-appeals, so that the same cause might not appear in the appellate court by piecemeal. *Sipes v. Puget Sound Elec. R. Co.*, 50 Wash. 585, 97 Pac. 723. It held in the same case, and has held in later cases, that this object was accomplished when all parties who appeared in the action and whose rights in the judgment or order appealed from could be adversely affected by the action of the appellate court were served, even though a party may be omitted who would be included by a literal interpretation of the statute. But further than this the court has not gone. It has uniformly insisted that all parties to an action or proceeding who have appeared therein and whose rights in the judgment or order appealed from may or can be adversely affected by the judgment of the appellate court must be served with the notice of appeal, else the appeal will be ineffectual and a dismissal necessitated. The cases need not be here collected. Sufficient of them to illustrate the principle are found in the briefs of counsel, and others will be found in the

footnotes to the sections of the statute cited where found in the code from which they are taken.

Tested by these principles, it seems clear that the service of the notice of appeal in this instance was insufficient. It is plain that the other creditors of the insolvent corporation, who appeared at the hearing in which the order was sought to be appealed from, were parties to the hearing. They are in the appellant's exact situation. They, like he, filed claims with the receiver and appeared at the hearing on the receiver's account in response to the same notice, and in the same manner that he appeared, and if they are not parties thereto, then he, likewise, is not a party thereto, in which case he could hardly appeal in any event. It is equally plain that their rights in the order entered can be adversely affected by the appeal. As shown in the statement, the appellant is not only claiming some two thousand five hundred and fifty dollars, which the trial court disallowed him, but is claiming that this sum, together with the sum which the court allowed as a general claim, is a preferred claim, entitling him to payment in full before any payments are made on the general claims. If the sum disallowed in the lower court is allowed on the appeal, then the general creditors, since the estate is insolvent, will receive a less sum than they otherwise would receive, and if the claims are adjudged to be preferred claims, it may be that other preferred creditors will receive a less sum than they otherwise would receive. It is manifest, therefore, that all of the other creditors of the insolvent corporation can be adversely affected by the appeal.

But the appellant argues that the receiver is the representative of the creditors, and that service upon him is equivalent to service upon the creditors. But

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the premise stated is true only in a general sense. In this state a receiver is defined by the code (Rem. Code, § 740) as a "person appointed by a court or judicial officer to take charge of property during the pending of a civil action or proceeding . . . and to manage and dispose of it as the court or officer may direct;" and this is the extent of his functions when appointed under the inherent powers of the court. He is but an arm of the court, and his acts and doings as receiver are the acts and doings of the court. In other words, he performs functions which the court itself is obligated to perform, and, where he is receiver of an insolvent estate, represents the creditors of the insolvent corporation in the same sense and to the same degree that the court appointing him represents them. In an instance, therefore, where the statute requires the service of a notice of appeal upon the prevailing party, and service upon all parties who have appeared in the action or proceeding who can be adversely affected by the judgment of the appellate court on the appeal, service upon him is not service upon such parties.

There is nothing decisive in the case of *Radebaugh v. Tacoma & Puyallup R. Co.*, 8 Wash. 570, 36 Pac. 460, that is contrary to the rule we here announce. There all parties who appeared in the proceeding in which the judgment appealed from was entered were served with the notice of appeal, and the question at issue was whether service of the notice was required upon those who had appeared generally in the suit, but had not appeared in the particular proceeding. It was held that service upon them was not necessary, the reason given being that the receiver represented them. Perhaps a better reason would have been that the parties not served were neither the prevailing parties in the proceedings in which the judgment was entered, nor

parties who had appeared therein, and hence not within the provisions of the statutes relating to service of notices of appeal. But, however this may be, our conclusion in that case in no way supports the appellant's contention, since all parties were served who had appeared in the proceeding, which is not the present situation.

The case of *Mogelberg v. Calhoun*, 94 Wash. 662, 163 Pac. 29, and the cases therein referred to, are likewise inapposite. Therein the court but applied the rule heretofore announced, namely, that it was not necessary to serve an appearing party, when it appears by an inspection of the judgment from which the appeal is taken that the party can in nowise be adversely affected by any judgment the appellate court can render or make on the appeal.

There is another reason why the notice in the particular case is ineffectual. The purpose of the legislature in requiring all persons appearing in the cause to be served with notice being to prevent several separate appeals from the same judgment, that purpose is not accomplished by a service upon the receiver alone. Here there were twenty or more claimants who appeared in the proceeding, many of whom did not prevail to the full extent of their claims. If the appellant can appeal by merely serving notice of appeal on the receiver, so can each of the others whose claims were adversely affected by the order appeal in the same manner. If they can appeal thus separately, the appeals must be heard separately, and the purpose of the statute be thus thwarted.

The present case also falls within the rule of the case of *Raymond Co. v. Little Falls Fire Clay Co.*, 72 Wash. 209, 130 Pac. 93. There the appellant appeared in the receivership proceedings and sought an

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order restraining the receiver from selling a patented brick kiln which the appellant claimed the insolvent company had erected under a license embodied in a contract the terms of which had not been complied with; or, in the alternative, that the receiver be directed to pay the appellant \$2,000, the amount claimed to be due under the contract. The court entered an order denying the application, and an appeal was taken from the order. A motion was made in this court to dismiss the appeal for want of service of the notice of appeal upon necessary parties. Passing upon the motion, we said:

“The parties upon whom respondent contends notice should have been served are the West Coast Grocery Company, a large creditor of the insolvent company, and plaintiff in the proceedings in which the receiver was appointed, and the Standard Clay Company, the purchaser at the receiver’s sale of the property and assets of the insolvent company. Under the decree of the court, the appellant shares in the insolvent estate as a general creditor. It contends, and if its appeal were here sustained, it would be held that under its contract of license the receiver must pay it the sum of \$2,000, thus depleting the fund upon which the West Coast Grocery Company looks for a payment of the amount due it from the insolvent company. The West Coast Grocery Company is, therefore, not only a party to the action, but has substantial interests involved in the decree, and affected by this appeal. It was therefore entitled to service of the notice of appeal, as a party to the action whose interests were to be determined by the appeal. Whether this would require service of notice of the appeal in a receivership proceeding upon creditors who are not parties to the action, but have only filed claims with the receiver, is not here determined, as that question is not involved in this ruling.”

The case before us presents a similar situation. The plaintiff in the proceeding in which the receiver was

appointed was not served with the notice of appeal, although it appears that she is a general creditor and has substantial interests in the order appealed from which could be affected by the appeal. See, also, for a similar holding, *Crawford v. Seattle, Renton & S. R. Co.*, 92 Wash. 670, 159 Pac. 782.

Our conclusion is that the appeal must be dismissed, and it is so ordered.

MOUNT and TOLMAN, JJ., concur.

[No. 15672. Department Two. September 15, 1920.]

In the Matter of the Estate of ELIAS J. BABCOCK.
MRS. ROY LOUIS MATTESON, *Appellant*, v. LOUIS N. MOSS,
*as Administrator etc., Respondent.*¹

APPEAL (58, 180)—DECISIONS REVIEWABLE—FINALITY—SETTLING ACCOUNT—TIME FOR APPEAL. A decree settling the final account of an administrator is a final judgment, and notice of appeal given on September 30 from an order settling the account July 10, and from a supplemental decree of distribution August 26 is in time, under Laws of 1917, p. 706, § 221, allowing an appeal in probate in the manner provided by law for appeals in civil actions.

APPEAL (282)—RECORD—STATEMENT OF FACTS—NECESSITY. Upon appeal from an order settling the final account of an administrator which was based on evidence introduced at the hearing, questions raised on the facts cannot be considered in the absence of a statement of facts.

EXECUTORS AND ADMINISTRATORS (160)—SETTLEMENT OF ACCOUNT—COUNSEL FEES. Under Laws of 1917, p. 687, § 158, allowing to an executor or administrator necessary attorney's fees, they are to be allowed in such sum as the court deems just and reasonable; and it must be presumed, in the absence of a statement of facts, that the allowance was based on the services rendered as shown by the record.

Appeal from orders of the superior court for Spokane county, Huneke, J., entered December 19, 1917,

¹Reported in 192 Pac. 939.

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October 9, 1918, and July 10, and August 26, 1919, approving the final account of an administrator, etc., after hearings before the court. Affirmed.

Alfred E. Putnam and Roy Louis Matteson, for appellant.

Lee & Kimball, for respondent.

MOUNT, J.—This appeal is from several orders of the trial court approving the final account of the administrator with the will annexed of the estate of Elias J. Babcock, deceased.

It appears that respondent was appointed administrator of the estate on August 23, 1909. On July 13, 1917, the administrator was required to file a report and account of the estate. On September 26, 1917, a supplemental report was filed. Objections were filed to these reports and the appellant demanded the removal of the administrator. After a hearing upon these objections, the trial court entered an order on December 19, 1917, approving and settling the reports of the administrator and refusing to remove him. Thereafter, on October 9, 1918, the administrator filed his final account. On May 7, 1919, objections were filed to this final account. These objections were heard upon oral evidence introduced at the hearing, and the result was a final order entered on July 10, 1919, by the court, approving the final account and allowing the administrator a fee of \$2,500, and his attorney a fee of \$1,000. On August 22, 1919, a final supplemental report was filed, showing payment of all costs of administration; and upon August 26, 1919, a decree of distribution was entered. Thereafter, on September 30, 1919, notice of appeal by Mrs. Matteson, beneficiary under the will, was served upon respondent, reciting that the appeal was taken from the following orders:

(1) Judgment or decree signed and entered on December 19, 1917;

(2) Judgment or decree allowing report, filed on October 9, 1918;

(3) Judgment or decree signed and entered on July 10, 1919;

(4) Judgment or decree signed and entered on August 26, 1919.

No statement of facts has been filed in the case. A number of letters and statements of counsel were included in the transcript. These were not certified by the trial court. In January, 1920, respondent moved this court to strike from the record what purported to be a statement of facts contained in the transcript and to dismiss the appeal. On January 30, 1920, that part of the motion relating to the statement of facts was granted and the purported statement of facts was stricken. The motion for dismissal was passed to the hearing on the merits. We have repeatedly held that a decree settling the final account of an administrator is a final judgment. *In re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116, 135 Am. St. 990; *In re Doane's Estate*, 64 Wash. 303, 116 Pac. 847; *Davis v. Seavey*, 95 Wash. 37, 163 Pac. 35, Ann. Cas. 1918 D 314, and cases cited.

The statute (Probate Code, ch. 156; Laws of 1917, p. 642), provides at § 221, p. 706, that any interested party may appeal from such order in the manner provided by law for appeals in civil actions. It is plain that the notice of appeal given on September 30, 1919, was given in sufficient time from the orders of July 10, 1919, and the subsequent order of August 26, 1919. The motion to dismiss must therefore be denied.

Each of the orders appealed from was based upon evidence introduced at the hearing. None of this evi-

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dence is before us. We therefore cannot consider the questions raised which are based upon the facts. It is argued by the appellant that the court erred in allowing a fee of \$2,500 to the administrator and a fee of \$1,000 to the attorney, because the court had no power to allow any fee except those provided for in § 6314, Bal. Code. That section was expressly repealed by Laws of 1917, p. 707, § 223, and was superseded by § 158 (p. 687), of that act, which provides:

“Where no compensation shall have been provided by will, or the executor shall renounce his claim thereto, he shall be allowed such compensation as to the court shall seem just and reasonable, based on the services rendered; and the like compensation shall be allowed to administrators. In all cases where it is necessary for such executor or administrator to employ an attorney, such attorney shall be allowed such compensation as to the court shall seem just and reasonable.”

No compensation was provided for by the will. The trial court, therefore, was authorized by statute to make the allowance for fees. We must assume, in the absence of a statement of facts, that the allowance was based on the services rendered, as shown by the proof.

So far as we can determine from the record before us, there was no error. The orders appealed from are therefore affirmed.

HOLCOMB, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 15712. Department One. September 16, 1920.]

THE STATE OF WASHINGTON, *Respondent*, v.
CLINTON A. LATHROP, *Appellant*.¹

JURY (43)—QUALIFICATIONS—CHALLENGE FOR CAUSE. Error cannot be predicated upon denying a challenge of a juror for cause where the record does not disclose any basis for the challenge and the accused did not exercise all his peremptory challenges.

CRIMINAL LAW (103)—EVIDENCE—PARTS OF SAME TRANSACTION—RES GESTAE. In a prosecution for murder, the blood-stained garments of deceased's daughter, shot by defendant at the same time, are admissible as part of the same transaction.

SAME (104)—EVIDENCE—RES GESTAE—STATEMENTS OF PERSONS INJURED. In a prosecution for murder, exclamations of the deceased immediately after the shooting, as she sank down, are admissible as part of the *res gestae*.

SAME (158)—OPINION EVIDENCE—EXAMINATION OF EXPERTS—HYPOTHETICAL QUESTIONS. It is not error to exclude a hypothetical question which was argumentative and not confined to the facts which there was evidence to support.

HOMICIDE (111) — TRIAL — INSTRUCTIONS — SELF-DEFENSE. In a prosecution for murder, where there was no evidence on the subject, an instruction as to self-defense is properly refused.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered April 4, 1919, upon a trial and conviction of murder. Affirmed.

Goodsell & Farrington, for appellant.

Joseph B. Lindsley and *H. G. Kinzel*, for respondent.

MAIN, J.—The defendant was charged by information of the crime of murder in the first degree. The trial resulted in a verdict and judgment of guilty as charged. Motion for new trial being made and overruled, the defendant appeals. On the second day of February, 1919, the appellant went to the house where his wife, Mary Lathrop, was living with her two chil-

¹Reported in 192 Pac. 950.

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dren by a former marriage and shot her twice with a revolver, causing her death soon afterwards. The parties at the time were living separate and apart and a divorce action was pending between them. On the morning of this day the appellant went to the house of his wife and sought entrance for the purpose of getting a ladder which it appears that he desired to use in connection with some work which he expected to do on the following day. He was admitted, secured the ladder, removed it to the back porch, reentered the house, went to the bedroom, where his wife was making a bed, and, as above stated, shot her twice. As he left the house he shot Margaret Gibson, his stepdaughter, a child about twelve years of age, seriously wounding but not killing her. Immediately after the shooting, the appellant's wife being mortally wounded and the child being seriously wounded, both rushed from the house screaming, to the sidewalk in front. Here Mrs. Lathrop sank down. As she left the house and while upon the sidewalk, she gave utterance to exclamations to the effect that the appellant had done the shooting. After the information was filed, the appellant plead not guilty and interposed the defense of temporary insanity. The trial resulted as above indicated, and the cause is here for review.

The first two assignments of error challenge the qualifications of two of the jurors that heard the cause. As to each of these jurors, a challenge for cause was interposed by the appellant's counsel and by the court denied. It is claimed that this was error. The ruling of the trial court was correct. The examination of the jurors does not disclose that there was any basis for the challenge for cause of either of them. *State v. Cronney*, 31 Wash. 122, 71 Pac. 783. In addition to this, the record does not disclose that the appellant, before

the jury which tried the case was selected, had exercised all the peremptory challenges which the law gives him.

The third assignment of error relates to the admission in evidence of a blood-stained garment worn by Margaret Gibson on the morning of the tragedy. As shown by the facts stated, Margaret Gibson was shot immediately after her mother, and as the appellant was leaving the house. It was part of the same transaction and there was no error in admitting the evidence. In addition to this, while the appellant interposed the plea of not guilty, there is no evidence that he did not do the shooting, but all the evidence is to the effect that he did, and, in fact, he substantially admitted it.

The fourth assignment of error relates to the evidence showing the exclamations of Mrs. Lathrop as she left the house after the shooting and as she sank upon the sidewalk. These exclamations were admissible because they were a part of the *res gestae*.

The eighth assignment of error relates to the ruling of the trial court in sustaining an objection to a hypothetical question propounded to an expert witness. There was no error here. The hypothetical question as stated to the witness was argumentative and interspersed with conclusions. It was not confined to a recital of facts which there was evidence to support. *State v. Underwood*, 35 Wash. 558, 77 Pac. 863.

The tenth assignment of error is predicated upon the failure of the trial court to give an instruction on self-defense. There are two reasons why it was proper not to have given the instruction. First, there was no evidence to sustain such a defense and it was rightly withheld from the jury. In addition to this, the record fails to show that any proper request was made for such an instruction.

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There are other assignments of error, but since they contain even less merit than those already referred to, it would serve no useful purpose to unduly extend this opinion by passing upon them *seriatim*. It is sufficient to say that they have all been considered and that the record, which is free from error, shows that the appellant had a fair trial.

The judgment will be affirmed.

HOLCOMB, C. J., PARKER, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 15919. Department One. September 16, 1920.]

J. A. BETCHER, *Appellant*, v. J. N. KUNZ *et al.*,
Respondents.¹

PLEADING (42)—ANSWER—INCONSISTENT DEFENSES. A general denial of a fraudulent conspiracy is not inconsistent with an affirmative defense of a release of damages.

RELEASE (6)—OPERATION AND EFFECT—JOINT TORT FEASORS. The acceptance of a sum of money from one joint tort feisor in satisfaction of a claim for damages and the execution of a release therefor operates as a release of the other joint tort feisor.

SAME (6)—OPERATION AND EFFECT—EVIDENCE. A release of damages from the sale of a certain block of stock reciting that it releases the seller from any and all further pecuniary liability for or on account of the sale of any of the stock of the company covers a conspiracy in the sale of other stock, and is not confined to the particular stock sold.

EVIDENCE (179)—PAROL TO VARY WRITING—OPERATION AND EFFECT OF RELEASE. The plain terms of an unambiguous release of damages cannot be contradicted by parol testimony that the release was not intended to include what the language expressly shows was included.

RELEASE (8)—VALIDITY—FRAUD—EVIDENCE—SUFFICIENCY. A release of damages should not be set aside for fraud where the parties dealt at arm's length, were represented by counsel, and there was no overreaching.

¹Reported in 192 Pac. 955.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered July 1, 1919, in favor of the defendants, upon withdrawing the case from the jury, dismissing an action for fraud. Affirmed.

Ripley & Quackenbush, for appellant.

Oscar Cain, C. M. N. Love, and Merritt, Lantry & Merritt, for respondents.

MAIN, J.—By the complaint, the defendants are charged with a conspiracy to defraud, and the plaintiff claims damages as a result thereof. In the answers, with one exception, which is not here material, after denying the fraudulent conspiracy, an affirmative defense was pleaded. The plaintiff replied to the affirmative matter in the answer. Upon the issues thus framed, the cause proceeded to trial before the court and a jury. At the conclusion of the trial, the court, upon motion of the defendants, withdrew the cause from the jury and entered a judgment dismissing the action. From this judgment, the plaintiff appeals. The facts necessary to present the questions to be decided upon this appeal may be summarized as follows:

Sometime during the month of May, 1917, the Oregon-Washington Automatic Speed Signal Company purports to have been organized as a corporation under the laws of the state of Washington, with its principal place of business at Harrington. Sometime later, probably during the month of June, the appellant purchased 10,000 shares of the capital stock, of the par value of \$1 per share, then owned by G. A. Lanphere. In payment of this he gave his promissory note in the sum of \$10,000. During the latter part of the year 1917 and the early part of the year 1918, the appellant purchased 5,000 shares more, but from another party,

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and for this gave promissory notes which aggregated the sum of \$5,000. On the 13th of April, 1918, the appellant went to a room in a hotel at Spokane with L. B. Simons and G. L. Rice, where he claims that they caused him to become drugged and intoxicated. In any event, on this occasion he signed three notes for \$5,000 each. A few days later, Rice drove to his home in an automobile and there handed him 30,000 shares of the capital stock of the Oregon-Washington Automatic Speed Signal Company, saying to him, as appellant testifies:

"Here, Betcher, you have got a bunch of this stock and I have got this. It ain't ever going to do me any good. You might as well have this."

Rice immediately drove away and the stock remained in the possession of the appellant. A day or two after this the appellant discovered in his pocket a written memorandum of contract whereby Rice had agreed to sell him this stock. The notes were negotiated and passed into the hands of innocent holders. The appellant claims that the first he knew it was claimed he had signed any notes was when he heard from some of his friends that they were being offered for sale in the neighborhood of Waterville, where he formerly resided. On or about the 23d of June, 1918, the appellant employed an attorney, who proceeded with him from Spokane to the home of the respondent Lanphere, near Waterville, and entered into negotiations which resulted in the following writing:

"Exhibit '13.' In consideration of the surrender and return by G. A. Lanphere to Julius A. Betcher of his promissory note for ten thousand dollars, dated on or about June 27, 1917, and payable to the order of said G. A. Lanphere on or about October 15, 1918, with eight per cent per annum interest after such maturity of said note for the return by the said Julius A. Betcher to

said G. A. Lanphere of ten thousand shares of the capital stock of the Oregon-Washington Automatic Speed Signal Company, evidenced by stock certificate evidencing and representing said stock, and in addition thereto the payment of five hundred dollars this day made by said Julius A. Betcher to said G. A. Lanphere, the said Julius A. Betcher does hereby release the said G. A. Lanphere from any and all further pecuniary liability for and on account of or connected with the sale of any of the stock of said company to the said Julius A. Betcher. Julius A. Betcher. In the presence of L. J. Birdseye."

This document will hereinafter be specially considered. Sometime during the month of September, 1918, the present action was begun, and, as already stated, charges a conspiracy to defraud. By the action the appellant sought to recoup his loss upon the stock that he had purchased and for which he had given notes other than the Lanphere stock. In the answer the defendants denied the charge of conspiracy to defraud and, as an affirmative defense, pleaded that the appellant, on or about June 24, 1918, made full and final settlement with Lanphere, who executed a release to him for and on account of any pecuniary liability on account of the sales of any stock in the corporation above mentioned. A copy of the release, which is the document above set out, was attached to the answers as an exhibit and made a part thereof. The appellant moved to strike the affirmative defense, which was denied. Thereupon he interposed a demurrer, which was overruled. The first error assigned relates to the ruling of the trial court upon the motion and demurrer.

If we have gathered the argument correctly, the theory of the appellant is that, since the respondents had denied in their answer the charge of fraudulent conspiracy, they could not plead affirmatively a release thereof without embodying in the affirmative defense

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an admission of the conspiracy. This contention cannot be sustained. The respondents, in denying the conspiracy and pleading affirmatively a release, were not within the rule prohibiting inconsistent defenses. *Davis v. Seattle National Bank*, 19 Wash. 65, 52 Pac. 526; *Irwin v. Buffalo Pitts Co.*, 39 Wash. 346, 81 Pac. 349; *Irwin v. Holbrook*, 32 Wash. 349, 73 Pac. 360. In the case last cited, the rule is stated as follows:

“Defenses are inconsistent only when one in fact contradicts the other. Where there is only a seeming and logical inconsistency, which arises merely from a denial and the plea in confession and avoidance, such defenses are not held to be inconsistent.”

The case of the *Seattle National Bank v. Carter*, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177, relied on by the appellant, is not out of harmony with this rule.

The next question is whether the release by its language covers the conspiracy charged in the complaint. It is contended that the release only applies to the 10,000 shares of stock which was purchased from Lanphere, and does not apply to the conspiracy by which it is claimed the appellant was defrauded in the other two transactions. It is the law in this state, as held in *Abb v. Northern Pac. R. Co.*, 28 Wash. 428, 68 Pac. 954, 92 Am. St. 864, 58 L. R. A. 293, that the acceptance of a sum of money from one joint tortfeasor in satisfaction of a claim for damages, and the execution of a release of such joint tortfeasor of all damages by reason of the injuries inflicted, operates as a release of the other joint tortfeasor, though the parties to the agreement may stipulate that the release of one shall not discharge the other. The rule of that case is restated in *Randall v. Gerrick*, 93 Wash. 522, 161 Pac. 357, L. R. A. 1918 D 179, as follows:

“It is the settled rule in this state that the acceptance of money in satisfaction of a claim against one

joint tortfeasor, even with a reservation that it is not to be considered as a release of another joint tortfeasor, operates to release the latter.”

It was held, however, that that case was distinguishable from the *Abb* case in that the defendant dismissed from the action was not liable in any event as a joint tortfeasor, and that the payment made by the dismissed party was in no sense intended by the parties to be applied in satisfaction of the injury. Under the doctrine of those cases, the release would have the same effect upon the other charged conspirators that it had upon Lanphere, who, as already pointed out, is a party to this action. This brings us to the question whether the release, by its language, was intended to relieve Lanphere from any further liability on account of any purchases of stock other than that which had been purchased from him. Turning to the release, it will be seen that it contains a recital of the settlement by Lanphere with the appellant relative to the 10,000 shares of stock which had been previously purchased. After setting out the terms of the settlement, it provides that the appellant “does hereby release the said Lanphere from any and all further pecuniary liability for and on account of or connected with the sale of any of the stock of said company to the said Julius A. Betcher.” This language, it seems to us, unequivocally was intended to apply, and does apply, to any transactions with which Lanphere might have been connected relating to the sale of the stock of the Speed Signal Company to the appellant. The immediate transaction with Lanphere had been settled by the surrender of the note and the delivering up of the stock. There could be no further liability on account of that transaction. The language quoted is specific that Lanphere was released from “any and all further” pe-

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cuniary liability for and on account of or connected with the sale of "any" of the stock of said company. The only other transactions, so far as the record discloses, were the two stated in the complaint for which the damages are sought. There is no escape from the conclusion that the language of the release covers the transactions set out in the complaint and was so intended at the time it was executed. At this time the appellant, according to his own testimony, knew that he had been drugged and doped by certain of the defendants in the \$15,000 transaction which had occurred more than two months prior, knew the manner in which the 30,000 shares of stock had been delivered to him, knew that, at about the same time, he found a contract in his pocket which recited his purchase of his stock, and knew, or it had been reported to him, that the notes were floating around Waterville and being offered for sale, and that the trustees, or some of them, had sold their individual stock. Prior to this time, also, he had stated to one of the trustees of the company that, in his opinion, the stock was a fake. The appellant, at the time he executed the release, according to his own testimony, must have had in mind the facts last recited. In the light of the facts thus admitted and the plain language of the release, it must be held, as already indicated, that the release covers the transactions alleged in the complaint.

The next question is whether oral testimony was admissible for the purpose of showing that, at the time the release was signed, it was not intended to cover any transaction other than that of the purchase of the Lanphere stock. Upon the trial the appellant offered to prove that the release did not cover, and was not intended to include, any of the charges of fraud or conspiracy alleged in the complaint. If this evidence is

admissible, then the language of the release may be contradicted by oral testimony. Some courts hold, and it may be the modern tendency, that oral testimony is admissible for the purpose of showing that the release of one joint tortfeasor was not intended to apply to another. This rule is not applicable to the facts in this case, and, so far as we are informed, has not been applied in any case where the oral testimony would contradict the plain and unequivocal language of the written release. When the release was executed and delivered, it at once produced a certain legal effect, provided its terms are given their plain meaning. This result cannot be varied by oral evidence that the parties did not intend what the language expressly shows that they agreed to. The plain language of the release cannot be contradicted and set aside by oral testimony. *Brown v. Cambridge*, 85 Mass. 474; *Goss v. Ellison*, 136 Mass. 503; *Denver & Rio Grande R. Co. v. Sullivan*, 21 Col. 302, 41 Pac. 501; *Allen v. Ruland*, 79 Conn. 405, 65 Atl. 138, 118 Am. St. 146.

Without reviewing the cases cited by the appellant in detail, it may be stated generally that an examination of them will disclose that they fall into one of four classes: First, cases where the release was oral. Second, cases which are affected by the statute of the particular jurisdiction. Third, cases where courts have taken a different view of the effect of the release of one joint tortfeasor from that adopted by this court in the *Abb* case, *supra*, and adhered to in *Randall v. Gerrick*, *supra*. Fourth, injuries not known at the time of the execution of the release. The cases cited, therefore, are not authority which would sustain the admission of oral evidence to vary the unambiguous language of the release and destroy its legal effect.

Finally, it is contended that the release signed was

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induced by fraud. In this contention there is no merit. At the time, the appellant was represented by counsel, the parties were dealing at arm's length, and the evidence fails to show any overreaching. The appellant apparently knew at the time that he was releasing Lanphere from all future liability growing out of any sales of stock in the company, but it may be that he did not then fully appreciate the legal effect of such a release. While the appellant, as appears from the record, has been grossly defrauded, the court cannot disregard settled legal principles in order to relieve him from a hard situation in which he has placed himself.

The judgment will be affirmed.

HOLCOMB, C. J., PARKER, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 15987. Department One. September 16, 1920.]

THE STATE OF WASHINGTON, *on the Relation of*
P. J. Cody, Plaintiff, v. THE SUPERIOR
COURT FOR SPOKANE COUNTY,
R. M. Webster, Judge,
*Respondent.*¹

VENUE (18)—CHANGE—PREJUDICE OF JUDGE—CONTEMPT—STATUTES—CONSTRUCTION. A prosecution for constructive contempt committed out of the presence of the court, is a proceeding within Rem. Code, § 209-1, in which defendant is entitled to a change of venue upon applying therefor upon his first appearance to answer to the charge.

Application filed in the supreme court July 23, 1920, for a writ of mandamus to compel the superior court for Spokane county, Webster, J., to transfer a cause to another department of the court. Granted.

¹Reported in 192 Pac. 935.

W. C. Donovan, for relator.

J. B. Lindsley and *Wm. C. Meyer*, for respondent.

MAIN, J.—This is an original application in this court for a writ of mandamus. The respondent is the Honorable R. M. Webster, one of the judges of the superior court for Spokane county. The purpose of the application was to require the respondent to transfer a cause pending before him to another department of the same court. On January 5, 1920, the respondent, as judge of the superior court of Spokane county, issued an injunction restraining and forbidding the parties to the action from doing certain things which it is unnecessary here to detail. The relator was not one of the defendants in the injunction suit, but it was provided in the order that all others not then known be restrained whose names and identity should be afterwards disclosed and who were associating, confederating, affiliating and acting in concert with the defendants named in the action. On July 6, 1920, an affidavit was filed in the injunction action charging the relator with contempt for violating the injunctive order. On the 17th day of July, 1920, a bench warrant was served on the relator and he was brought into court to answer the charge of contempt. Upon his first appearance a motion was made that the cause be transferred to another department of the same court. This motion was supported by an affidavit charging that the presiding judge, the respondent, was prejudiced against the relator. The motion for transfer was promptly made and the affidavit met the requirements of Laws of 1911, ch. 121, p. 617. The transfer was denied. The relator thereupon made application to this court for writ of mandamus to require the transfer.

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In answering the alternative writ, the respondent replied that he had not made the transfer because the affidavit of prejudice statute, Laws of 1911, ch. 121, p. 617 (Rem. Code, § 209-1 *et seq.*), did not apply to a hearing for contempt, whether the contempt be direct or constructive. The contempt with which the relator was charged was not committed in the presence of the court, and was therefore constructive. This case cannot be distinguished from *State ex rel. Russell v. Superior Court*, 77 Wash. 631, 138 Pac. 291. There the relator was charged with contempt not committed in the presence of the court, and upon his first appearance in answer to the charge, made a motion for change of judge, supported by affidavit. The transfer was denied by the trial court in that case, and an application was here made for the writ of mandamus requiring the transfer. It was there held that the relator had a right to the transfer, and a writ of mandamus was issued directing the respondent judge in that case to grant the motion. It is admitted that the *Russell* case is in point and controlling unless overruled. It is argued, however, that the case is unsound and should not be adhered to. It is said that, since the superior court is a constitutional court with inherent power to punish for contempt, any act of the legislature which would deprive it of this power is unconstitutional. This is not a new thought to the court, as the same matter has at times been suggested in consultation when cases involving the statute were under consideration. The court has, however, since the passage of the statute, in a considerable number of cases sustained the law, and we are not now inclined to disturb the holding in the *Russell* case. Since that case cannot be distinguished from the present one, it follows that the respondent was in error in failing to grant the transfer, and that

a writ of mandamus should issue directing that the motion be granted.

Let the writ issue.

HOLCOMB, C. J., FULLERTON, PARKER, and MITCHELL, JJ., concur.

[No. 15777. Department Two. September 16, 1920.]

THE STATE OF WASHINGTON, *on the Relation of*
L. V. McWhorter, Plaintiff, v. THE SUPERIOR
COURT FOR KING COUNTY, *Everett Smith,*
*Judge, Respondent.*¹

VENUE (22)—CHANGE—APPLICATION—HEARING AND DETERMINATION—AMENDMENT OF COMPLAINT—POWERS OF COURT. Where the original complaint in an action for malicious prosecution stated a transitory action and defendant moved for a change of venue to the county of his residence, it is proper to permit the plaintiff to amend his complaint to show that the action was against a public officer for acts done in virtue of his office which, by Rem. Code, § 205, must be tried in the county where the cause arose, and in which the action was brought, thereby working a denial of defendant's motion for a change of venue.

Certiorari to review an order of the superior court for King county, Smith, J., entered February 20, 1920, denying a motion for a change of venue. Affirmed.

Bell & Thompson, for relator.

Robert M. Jones, for respondent.

MITCHELL, J.—It appears from the affidavit for, and the return to, a writ of review in this case that Charles D. Davis commenced an action in the superior court of King county against L. V. McWhorter for malicious prosecution. The summons and complaint were served upon him in that county. Within twenty

¹Reported in 192 Pac. 903.

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days McWhorter appeared in the cause and filed a motion for a change of venue to the superior court of Yakima county, upon affidavit proof that he was, and for more than a year had been, a resident of Yakima county. Before the motion was presented to the court, Charles D. Davis caused to be filed in the case an affidavit alleging that the action was one for malicious prosecution growing out of his arrest and prosecution in King county at the instance of McWhorter, upon a criminal complaint before one of the justices of the peace of Seattle precinct, King county; that, in so doing, McWhorter acted in his capacity as an officer of the state humane bureau of this state; that the action for malicious prosecution was brought for acts done by McWhorter in virtue of his office and as a public officer; and that all the witnesses competent to testify in the action were residents of King county.

At the time of presenting the affidavit, Davis made an oral application for leave to amend his complaint to set up the true facts as declared in his affidavit. The two applications were presented to the court at the same time. The motion for a change of venue was continued to a future specified date, and the application of Davis to amend his complaint was granted. Prior to the date to which the motion for a change of venue was finally continued, Davis made and filed an amended complaint entitled "Charles D. Davis, plaintiff, v. L. V. McWhorter, agent of the state humane bureau, defendant," wherein, in addition to allegations similar to those in the original complaint, he alleged that McWhorter was and is a qualified and acting public officer of the state of Washington, to wit, an agent of the state humane bureau, and that, acting under color of, and in virtue of, his office as such agent of the state humane bureau, he appeared before a jus-

tice of the peace for Seattle precinct, in King county, and charged the plaintiff with the offense of cruelty to animals, alleging such offense to have been committed at Seattle, Washington. Thereupon the trial court made and entered an order denying the motion for a change of venue.

It is contended on behalf of the relator that he was entitled to have his motion for a change of venue granted, not as a privilege, but as a matter of right, and a number of cases from this court, as late as *State ex rel. Poussier v. Superior Court*, 98 Wash. 565, 168 Pac. 164, are submitted in support of the argument. In transitory actions, such as the original complaint in the cause in the superior court was, it is the general policy or rule of the law that the action must be tried in the county where the defendant resides. Rem. Code, § 207. The next section of the statute (208) provides, if the county in which such action is commenced is not the proper one, the action may still be tried therein, unless the defendant properly and seasonably demands that the trial be had in the proper county. Section 209, Rem. Code, provides:

“The court may, on motion, in the following cases, change the place of trial, when it appears by affidavit or other satisfactory proof, (1) That the county designated in the complaint is not the proper county; or . . .”

Oftener than otherwise, the authorities along this line relate to transitory actions where there is a dispute as to the residence of the defendant, or, his residence being admitted, there is a counter appeal addressed to the discretion of the court upon some subject other than the residence of the defendant, to continue the case in the court hearing the application for a change of venue. But the situation here is vastly different, as we view it. Section 205, Rem. Code, pro-

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vides that an action against a public officer for an act done by him in virtue of his office shall be tried in the county where the cause, or some part thereof, arose. That is, by the mandatory terms of the statute, such action is local; the reason whereof being important to the legislature and not to the courts. In the case here, the original complaint in the superior court disclosed an action which was transitory. Prior to the date of presenting the motion for a change of venue, the plaintiff therein, not in the exercise of any privilege to defeat the change of venue, but in the protection and preservation of an essential of his cause of action as he claims it actually existed, and in relation to the matter of venue for the purpose of a proper trial of his cause of action, applied to the court, upon a proper showing, for leave to amend the complaint. The cause of action was the same, only it had been imperfectly stated in the original complaint; for, if the additional matter stated in the amendment be true, then, it would seem, the superior court of King county is the only one in which the case could be commenced; else, upon the appearance of those additional facts in the course of the trial in the superior court of another county, the action would have to be dismissed for want of jurisdiction. *McLeod v. Ellis*, 2 Wash. 117, 26 Pac. 76. It appears, therefore, that the real situation was, the power and right of the trial court to entertain simultaneously with the motion for a change of venue, in what appeared to be a transitory action because of the undisputed residence of the defendant in another county, an application on the part of the plaintiff to amend his complaint to conform to the actual facts where the proposed amendment would fix the venue, not because of any discretionary power of the court, nor the exercise of any privilege on the part of the

litigants, or either of them, but because of the positive terms of the statute fixing the venue. When the two simultaneous applications came on for hearing, it became necessary to consider the application for leave to amend, for it suggested at once the venue fixed by the statute which declares that the real cause of action the plaintiff was asserting is a local action and must be tried in the county where it, or some part of it, arose. Being a local action, it was clear from the complaint, reinforced by the amendment proposed, that it had been properly commenced in the superior court of King county—a venue which could not be disturbed simply because of the residence of the defendant in some other county. Under the liberality enjoined by statute for the amendment of pleadings, the court acted within its powers in allowing the amendment, proposed at a most opportune time. Having allowed the amendment, it necessarily worked a denial of the defendant's motion for a change of venue upon the ground preferred in his motion.

The proceedings in the trial court are affirmed.

HOLCOMB, C. J., FULLERTON, PARKER, and TOLMAN, JJ., concur.

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[No. 15986. Department One. September 16, 1920.]

WEST SIDE IRRIGATING COMPANY, *Appellant*, v.
MARVIN CHASE, *as State Hydraulic Engineer*,
et al., *Respondents*.¹

APPEAL (244)—SUPERSEDEAS—BY SUPREME COURT. Upon appeal from a judgment of the superior court, affirming an order of the state hydraulic engineer, which deprived an irrigation company of a portion of its water supply needed for irrigation, the supreme court, in the exercise of its appellate and advisory jurisdiction, will grant a supersedeas where respondents are acting officially and threatening to reduce the customary supply of water, causing irreparable damage to crops, and it did not appear that any person interested had cultivated land on the strength of the judgment appealed from.

Application filed in the supreme court July 22, 1920, to allow and fix the amount of a supersedeas and stay bond pending an appeal from a judgment of the superior court for Kittitas county, Holden, J., entered May 10, 1920. Granted.

Carroll B. Graves and Hartman & Hartman, for appellant.

The Attorney General, Glenn J. Fairbrook and Fred J. Cunningham, *Assistants*, for respondents.

MITCHELL, J.—This is an application on the part of the appellant to allow and fix the amount of a supersedeas and stay bond during the pendency of the cause on its merits on appeal to this court. It appears that, a number of years ago, the West Side Irrigating Company appropriated water out of the Yakima river, and ever since has been openly using and furnishing such water for irrigation and domestic purposes to its shareholders upon lands owned by them, amounting to about seven thousand acres, situated in the county of

¹Reported in 192 Pac. 892.

Kittitas. In the month of August, 1919, the respondent, Marvin Chase, as hydraulic engineer of the state, gave notice to the company to desist from using its customary amount of appropriated water, and thereafter threatened to carry out the order and deprive the company of one-third of the amount it was using. Feeling aggrieved at the order, the company appealed to the superior court of Kittitas county, as provided for in the water code, Laws of 1917, ch. 117, § 11, p. 452. Desiring a stay, a bond was given at that time in an amount fixed by the superior court, and with sureties to the satisfaction of the court. Upon the trial of the appeal, a judgment of dismissal was entered by the superior court on May 7, 1920; whereupon, as allowed by the terms of the water code, an appeal was taken to this court. The appeal here seems to have been diligently prosecuted and is now pending subject to assignment for hearing. On July 21, 1920, the respondent again gave notice to the appellant of his purpose to reduce the amount of water appellant was using, so as to conform to the order that had been affirmed by the trial court. Immediately this application was made here, wherein the case was already pending on appeal, for leave to file a supersedeas to preserve the *status quo* until the appeal could be disposed of.

It is contended by the petitioner, and conceded by the respondent (so we find it unnecessary to decide the matter), that there is no provision of the water code, or otherwise, that specifically provides for a supersedeas on an appeal from the judgment of the superior court in such an instance as this. That this court has the power, in a proper case, to allow and fix the amount of a supersedeas bond in the complete exercise of its appellate and revisory jurisdiction is

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settled by the cases of *Campbell Lumber Co. v. Deep River Logging Co.*, 68 Wash. 431, 123 Pac. 596, and *Hillman v. Gordon*, 107 Wash. 249, 181 Pac. 677. The power being admitted, respondents contend that this is not a proper case for the exercise of that power. We must take into consideration the effect upon the petitioner if no bond be allowed and the judgment of the superior court should be reversed on the appeal; and the same of the respondents in case a bond is given and the judgment is affirmed on appeal.

Respondents are acting officially and not otherwise. It appears from the application and the affidavits on behalf of the parties that the irrigating season is the months of April-October, with a need during the month of October of less than one-half of the amount of water used during the other months. It is shown by the appellant that its shareholders are owners of cultivated lands, the crops on which were grown with reference to the use of all the water appropriated through its ditch, and that to cut off or so materially reduce their supply at the time of hearing the application, viz., the latter part of August, would cause them irreparable damage. On the contrary, it does not appear that other crop raisers have added to their cultivated areas this season upon the faith of any diminution in the amount of water to be used by the appellant. It was known last season, and all of the present one, that the appellant was involved in litigation contending for the right to hold and use the same quantity of water it had theretofore used, and that at all times from August, 1919, until the date of the judgment of the superior court on May 7, 1920, the appellant continued the right to use its usual amount of water, because of a stay bond it had furnished at the time of taking the appeal to the superior court from the order of the hydraulic

engineer; and further, after the date of the judgment of the superior court, the respondents, being aware of the appeal to this court, gave no further notice for ten weeks that there would be any attempt at any season of the year to enforce the order in question. Of course, the appellant must be taken to have known that its stay bond was no longer effective after the judgment of the superior court; but the course and history of these things is examined as justifying a strong inference, which is in keeping with the lack of any affirmative showing, that no one interested has increased his crop area this year upon the faith and certainty of the lessening of the amount of water appellant would use. We are of the opinion that this is a case in which a supersedeas should be allowed. Upon all that appears now, it is difficult to determine the amount of bond to be given, but we are satisfied one in the sum of \$2,500 will be sufficient and fair.

It is therefore ordered that the petitioner, appellant, shall have the right to stay the enforcement of the order complained of, and which was affirmed by the trial court, until the further order of this court, by filing in the office of the clerk of the superior court of Kittitas county, within ten days after receiving notice of this order, a bond in the penal sum of \$2,500, with sureties to be approved by the clerk of that court, properly conditioned as a supersedeas and stay bond.

HOLCOMB, C. J., FULLERTON, and PARKER, JJ., concur.

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[No. 15742. Department One. September 16, 1920.]

HENRY THOMPSON, *Appellant*, v. THE CITY OF
BELLINGHAM, *Respondent*.¹

MUNICIPAL CORPORATIONS (444, 470)—STREETS—DEFECTS—ASSUMPTION OF RISKS—CHOICE OF WAYS—INSTRUCTIONS. One who is familiar with the locality and knows the danger of turning off a street leading to a bridge on an unguarded railroad trestle assumes the risk where he voluntarily chose that way in an unusual condition of foggy weather, if prudence and care requires him to avoid it by another convenient and safe way.

SAME (423)—STREETS—DUTY OF CITY. A city is only required to use reasonable care to keep its streets in a reasonably safe condition for travel.

APPEAL (460)—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Error in instructing as to the duty of the city is harmless where the plaintiff's contributory negligence was the approximate cause of the accident.

MUNICIPAL CORPORATIONS (437) — STREETS — DEFECTS—UNUSUAL DANGERS—BARRIERS. A city is not liable for failure to place barriers where they were forbidden by the public service commission.

APPEAL (465)—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Error cannot be predicated upon the failure to instruct as to contributory negligence where the jury found that issue in favor of the appellant.

Appeal by plaintiff from a judgment of the superior court for Whatcom county, Hardin, J., entered June 27, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Bixby & Nightingale, for appellant.

T. D. J. Healy, for respondent.

MITCHELL, J.—This action was brought against the city of Bellingham to recover damages for injuries alleged to have been caused by the negligence of the city in failing to keep the north end of Prospect street in a reasonably safe condition for public travel. The

¹Reported in 192 Pac. 952.

answer denies negligence on the part of the city and affirmatively alleges contributory negligence of the plaintiff. The plaintiff is a physician. He and his wife were injured in the accident. He sued to recover the sum of \$5,669.45. There was a trial by jury, which resulted in a verdict of \$217.45. A motion for a new trial was made by the plaintiff, denied by the court, and from a judgment entered upon the verdict, the plaintiff has appealed.

The first assignment of error is the denial of the motion for a new trial, based upon the ground of inadequacy of damages allowed. It is contended by the appellant, and now formally conceded by the respondent, that the verdict was reached by simply adding together the hospital and auto repair bills. Whereupon, the appellant interposes a motion that this court reverse the judgment and remand the cause to the lower court for a new trial upon the single issue of the amount of appellant's damages. Our view of the case in other respects makes it unnecessary to notice this assignment of error and the motion, other than to say the one is without merit to effect a reversal and that the other will be denied.

A fuller understanding of the case may be made before considering other assignments of error. The injuries complained of occurred in an accident on a street railway trestle over Whatcom creek, at the north end of Prospect street, in the city of Bellingham, about 3:30 p. m., on December 16. Prospect street is a short, much traveled street, running northerly, from Holly street, five or six blocks to Whatcom creek, where it ends. It is forty-six feet wide between the curbs, and paved with brick to a point about seventy-five feet from its north end, where its surface drops down slightly to plank pavement that extends to the north

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end of the street. Near the north end the street slopes downward one and one-half to two per cent. It is intersected at the north end from the east squarely by Lottie street, which terminates at the intersection. Central avenue crosses or runs into Prospect street, next south of and parallel with Lottie street. On the west side of the north terminus of Prospect street and connecting with it, a concrete bridge about seventy feet long has been constructed across the creek. The bridge is the southern terminus of Dupont street. The turn to the left from Prospect street onto and across the bridge is rounding at the inside curb, and thence on from Prospect street at an angle not greater than forty-five degrees. Dupont street leads on towards the north limits of the city. The bridge is twenty-four feet wide between five-foot walkways, and is provided with heavy substantial concrete bridge rails. For a number of years, until a few years before the accident, the way across the creek was over a wooden bridge more nearly at a right angle with Prospect street. For eighteen or twenty years the street railway track has been in use along the center of Prospect street. Near the north end of the street the car track turns slightly to the east of the thread of the street, thence runs on beyond the end of the street on private property, and immediately crosses the creek on the car company's trestle. The trestle can be clearly seen from any point two or three blocks south on Prospect street. On the east side at the north end of the street, there is a fence four feet high, four boards, eighteen feet long, extending from a point six feet east of the east rail of the car track to the corner of a building on the north side of Lottie street. On the opposite side of the street railway track the southerly end of the easterly bridge rail comes within five feet and ten inches of the west

rail of the street car track. The evidence shows, with reference to the barriers on each side of the car track, that the city authorities followed the instructions of the public service commission not to place obstructions or barriers nearer than five feet to the rails of the car track. To provide light for the locality, the city maintained a post light built on each end of the concrete bridge rails, an arc light on a pole placed by the wooden barrier near the corner of the wooden building on the north side of Lottie street, another arc light suspended near the center of Prospect and Lottie streets, and still another on a pole on the west side of Prospect street about fifty feet south of the turn onto the bridge. None of the lights, however, were burning when the accident happened to the appellant.

The evidence is perfectly clear from the appellant himself, substantially as follows: He has practiced medicine and surgery in Bellingham the last twenty years; his office was at number 7 Prospect street, and for the last three years his residence was about two miles north from his office and within the city limits; the most direct route from his home to his office took him over Dupont and Prospect street, that was his regular route; there were other streets he could use for that purpose, but they were not so direct; he used a Ford sedan, commencing in July, 1918. He further testified:

"I traveled over that street a great number of times before the concrete bridge was put in and afterwards. I knew where the street car track went down Prospect and on across Whatcom creek; knew it well . . . I knew that the street car track left the street and went over this trestle bridge."

Returning to his office on the day of the accident, he left his residence, accompanied by his wife, at two

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o'clock in the afternoon. At that time and place the sun was shining. As to the drive to the office, he said:

"I could see plainly enough. There would be a fog and then there would be an intermission of sunlight, and so on until I got down to the bridge, but the closer I got to the bridge the more dense the fog was."

Arriving at his office, the doctor remained in, his wife went out shopping. The next hour the fog became more noticeable around his office building, thicker at times than at others. At 3:30 p. m., upon the return of his wife to the office, they immediately started home, lighting the automobile. He testified:

"I took the precaution to start home a little earlier because I was afraid of it getting dark, and I took that precaution. I was afraid of the fog because it was extremely dense and heavy that day . . . after leaving Central avenue, I could not see the ground at all. I only knew my relative position on the street from where I was back on Central avenue, . . . as I coasted along down Prospect street I was not conscious as to when I left the pavement and got onto the plank, . . . I kept to the right of the center line of the street. I expect I kept pretty close to the street car line. I might have deviated a little. As a general thing, I drove pretty near the right-hand rail of the car track. I didn't drive over close to the right-hand curb. I should not want to do so. I followed the rail of the track until I got to Central avenue and then could not see it, because the fog was so dense. I knew there was a turn there somewhere, but I could not see where I was going or I should not have run into that trap."

Mrs. Thompson testified, among other things, as follows:

"The doctor stopped at the office and I did some shopping. I went up to the book store and was looking at books, and finally looked out and the sun was shining, but there was some fog, and I rushed down

to the office and said to the doctor that I thought we had better start for home and, of course, the fog was more dense down there than it was up at the book store. It seemed to be in places thicker than in others. It was early for us to start home, but I thought that it would be darker as it went later in the afternoon, and I said that he had better start for home, and we did. He lighted the lights, all of them, on the automobile, and we were driving very slowly—as slow as we could possibly go and keep the machine going. . . . The windshield was open, and both side windows were open. I could see out, but the fog was so dense, of course, you could not see any distance ahead of you at all. When we were probably half way down, or more than half way down, to the bridge there was just a wall of fog. You could not see anything. You could not see the sidewalk nor the buildings along the street on either side. I first discovered where we were when the machine tipped over.”

The second assignment of error relates to an instruction upon the subject of the prudence and care required of a traveler upon a street if the evidence shows a place approached to be dangerous on account of a foggy condition of the weather, and the duty to avoid it if there is another convenient and safe way. The instruction is lengthy and we do not reproduce it. Appellant contends this court has repeatedly held it to be a question for the jury only as to whether an ordinary prudent person would have selected some other than his customary route. The cases relied on are not applicable here. Generally they are cases in which the defects in the customary way were caused by the negligent acts of the city in creating or permitting them to continue. The true distinction is pointed out in *Stock v. Tacoma*, 53 Wash. 226, 101 Pac. 830, as follows:

“Appellant contends that this case falls within the principle announced in 5 Thompson on Negligence,

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§ 6273: 'One who, with full knowledge of the defective condition of a sidewalk, crosswalk, or roadway, and of the risks incident to its use, voluntarily attempts to travel upon it, when the defect can easily and without substantial inconvenience *be avoided by going around it* or taking a safer way, is not in the exercise of reasonable care, but *assumes the risk*, and cannot recover damages from the city for any resulting injury.' In support of this rule appellant cites many authorities, some of which sustain its contention upon facts almost identical with those here presented. The principle there announced should not, however, be or have been extended to cover a case like the one at bar. As originally announced and properly applied, it governs only those cases where an unusual condition exists; as, for instance, icy or slippery sidewalks, sidewalks or streets in course of repair, or unusual obstructions in the way of pedestrians. Here we have a known condition, a walk made by the city along a bulkhead, without guard rail or light to secure the pedestrian; itself an invitation to travel by night as well as by day."

The present case is one in which an unusual condition of foggy weather existed. It came on rapidly, and up until the time of the accident it appeared to be partial, uneven and changing, and there is no evidence to show that the city had notice, actual or constructive, of the fog bank entered by the appellant at a place well known by him to be possible of danger. The instruction as given was proper.

The next assignment of error relates to an instruction to the effect that the city is required to keep its streets only in a safe condition for travel. The charge against the instruction is its inapplicability because the evidence shows the place where the accident happened was obviously dangerous. We are unable to surmise anything the city omitted to make the locality safe, considering the rights of the street car company and the orders of the public service commission concerning

the passageway for street cars at the north end of Prospect street. Surely there should be no indulgence in the unreason of requiring the city to anticipate and provide against the danger of the fog bank at the bridge as the appellant went home. If the danger was obvious, it was so only to the appellant, who persisted in proceeding in the face of an unusual natural condition rapidly occurring and completely baffling only within a limited area. Being perfectly familiar with the condition of the locality, now suddenly obscured by a bank of fog, appellant had no right to act on the ordinary presumption that this particular way or place was safe, or that it did not hold out the possibility of his straying through the gap onto the railway trestle. Strictly speaking, the instruction was less favorable to the city than it might have been—"the duty devolves upon the city to use reasonable care to keep it (street) in a reasonably safe condition for travel." *Lautenschlager v. Seattle*, 77 Wash. 12, 137 Pac. 323.

The next assignment relates to an instruction touching the duty of the city to provide street lights in the daytime during foggy weather. As an abstract proposition of law, the particular wording of the instruction may go too far, but, under the facts as they existed in this case, the instruction is not faulty. It is unimportant in any event, for we are satisfied, as a matter of law, that the appellant's contributory negligence was the proximate cause of his injuries.

Next it is claimed there was error in the instructions, (a) upon the subject of barriers erected by the city; and (b) as to anticipating and providing against unusual dangers at the place in question. As to the one, it is claimed to be inapplicable, manifestly because of the gap through which the street railway is laid. It has already been noticed that the orders of a superior

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authority were observed in that regard and that appellant was fully aware of the situation. As to the other, while it is true one has the right to rely on reasonable provisions for the safety of travel on streets by night as well as by day, it is clear the instruction relates to an unusual local condition or darkness caused by fog in the daytime. Both instructions, as given, were proper in this case.

The last assignment complains of an instruction upon the subject of contributory negligence, predicated upon conditions the appellant contends do not exist in the case. It is unnecessary to decide, among other reasons, because, if there was error, it was harmless, for the jury, by its verdict, was with the appellant in this respect.

The cause is one in which the appellant took a chance instead of precaution. It is plain he was unduly imprudent and did not use the requisite care. Our views herein are supported by the conclusions reached in the cases of *Chase v. Seattle*, 80 Wash. 61, 141 Pac. 180, and *Hobert v. Seattle*, 32 Wash. 330, 73 Pac. 383. Counsel for the respondent, while stoutly arguing against the alleged negligence of the city and insisting upon the contributory negligence of the appellant, has taken no appeal for the city from the judgment, which is hereby affirmed.

HOLCOMB, C. J., PARKER, MAIN, and BRIDGES, JJ., concur.

[No. 15753. Department One. September 27, 1920.]

HANS OBERLEITNER, *Appellant*, v. WILLIAM A. MOORE,
as Receiver etc., Respondent.¹

JUDGMENT (227)—BAR—MATTERS CONCLUDED—GARNISHMENT PROCEEDINGS. A judgment in garnishment proceedings which found that defendant was the holder of certain shares of capital stock of the garnishee, but failed to determine whether or not the garnishee was indebted to the defendant, and granted the garnishee further time to ascertain the state of its accounts with the defendant, is not *res judicata* upon the question of the indebtedness of the defendant to the garnishee.

GARNISHMENT (32)—LIABILITY OF GARNISHEE—ASSIGNMENT OF CLAIMS PENDING GARNISHMENT. An assignment by the garnishee for a past consideration, after service of the writ and insolvency of the defendant, will not relieve him from liability to the plaintiff.

APPEAL (263, 316)—RECORD—STATEMENT OF FACTS—ALL THE EVIDENCE—CERTIFICATE AS TO ALL THE FACTS. Error cannot be assigned upon findings of fact where it appears from the record that all the facts properly considered by the court were not brought up in the statement of facts, notwithstanding the court certified the statement to contain all the material facts.

GARNISHMENT (54)—PROCEEDINGS—COSTS. Where plaintiff is successful in garnishment proceedings below, he is entitled to costs in that court.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered September 15, 1919, in favor of the plaintiff, in garnishment proceedings, tried to the court. Affirmed in part and reversed in part.

R. W. Greene, for appellant.

Will J. Griswold, for respondent.

PARKER, J.—The plaintiff, Oberleitner, seeks recovery from the garnishee defendant Moore, as receiver of the Campbell-Moore Lumber Company. The plaintiff, deeming himself aggrieved by the judgment

¹Reported in 192 Pac. 904.

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of the superior court for Whatcom county, awarding him recovery only in part as claimed by him, has appealed to this court.

On January 28, 1919, appellant was awarded recovery against A. H. Campbell and Carrie E. Campbell, his wife, by judgment of the superior court for Whatcom county, in the sum of \$852.95. Appellant caused a writ of garnishment to be issued in the case and served upon the Campbell-Moore Lumber Company, commanding it to answer as to the amount, if any, it was indebted to Campbell and wife, or either of them; and also what property, if any, it then had in its possession or under its control belonging to them, or either of them. On January 31, 1919, the garnishee defendant lumber company answered as follows:

“(1) That it has in its possession a certificate for sixty-six shares of the capital stock of Campbell-Moore Lumber Co., a corporation, issued to defendant A. H. Campbell, being certificate No. 4; that it has no other personal property in its possession or under its control belonging to said A. H. Campbell, nor is it indebted to him in any sum or amount whatsoever.

“(2) That the garnishee defendant is unable to answer as to whether or not it is indebted to defendant Carrie E. Campbell in any sum whatsoever, the said Carrie E. Campbell claiming that an indebtedness of approximately \$3,000 exists, but numerous creditors of said Carrie E. Campbell claimed that they furnished supplies to this garnishee defendant and charged them to this garnishee defendant instead of to said Carrie E. Campbell, and that the aggregate of the claims of such creditors is approximately the amount claimed to be due from this garnishee defendant to said Carrie E. Campbell; that this garnishee defendant was operating a sawmill, and the said Carrie E. Campbell operated a cook-house, where the employees of said mill boarded, and likewise operated a small store at which said employees also traded; that the board and store bills of said employees have been deducted from

the wages of said employees by this garnishee defendant, but that the supplies and merchandise furnished by numerous creditors to said cook-house and said store have not been paid for by the said Carrie E. Campbell and that said creditors claim to have charged the same to this garnishee defendant, said supplies and merchandise having been ordered by both defendants A. H. Campbell and said Carrie E. Campbell, and the said A. H. Campbell having been at the said time in control and charge of the said sawmill operated by this garnishee defendant; that this garnishee defendant does not have any personal property belonging to said Carrie E. Campbell in its possession or under its control and is not indebted to said Carrie E. Campbell in any amount or sum whatever, capable of being determined at the present time, nor other than as hereinbefore set forth."

On February 21, 1919, a judgment was rendered with reference to the shares of stock owned by Mr. Campbell, by which judgment the shares of stock were ordered sold and the proceeds thereof applied towards the satisfaction of appellant's judgment against Mr. and Mrs. Campbell. No disposition was then made by the court of the question of whether or not either Mr. or Mrs. Campbell was indebted to the garnishee defendant lumber company at the time of the service of the writ of garnishment upon it. This judgment concluded as follows:

"It is further ordered that the garnishee defendant be and it is hereby granted further time within which to ascertain the state of its account with defendant Carrie E. Campbell, and to file a supplemental answer as garnishee herein."

This judgment is silent as to any indebtedness owing to Mr. Campbell by the garnishee defendant lumber company—that is, it is not, in terms, either for or against appellant as to any indebtedness owing by the garnishee defendant lumber company to Mr. Camp-

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bell. On March 24, 1919, the garnishee defendant lumber company, having become insolvent, passed into the hands of respondent Moore as its receiver. This apparently rendered the shares of stock of Mr. Campbell, which had been ordered sold, worthless; and the record, we think, warrants us in assuming that nothing was realized from that source towards the satisfaction of appellant's judgment against Mr. and Mrs. Campbell. On July 9, 1919, the court entered in this garnishment proceeding its order as follows:

"It is therefore now ordered that said William A. Moore, as receiver, be substituted for said Campbell-Moore Lumber Company, a corporation, as garnishee defendants to plaintiff at the time of the service of the answer and return herein regarding the liability of defendants to plaintiff at the time of the service of the writ of garnishment herein."

On July 17, 1919, the respondent, as receiver, in compliance with this order, answered as follows:

"That at this time the defendant, Campbell-Moore Lumber Co., a corporation, is indebted to Carrie E. Campbell in a sum of approximately \$1,400; that all of said sum so indebted to said Carrie E. Campbell is owed to various wholesale merchants, and all of said account has been assigned in writing to said wholesale merchants by the said Carrie E. Campbell, and that this answering garnishee defendant has been instructed to turn said moneys over to the respective assignees to whom it belongs; that in view of said assignments, this garnishee defendant answers that he has no money in his possession belonging to said defendant Carrie E. Campbell.

"As to defendant A. H. Campbell, this defendant answers that the company is indebted to said A. H. Campbell at this time in the sum of approximately \$700, which said sum has been assigned in writing to H. J. Frolich, and this answering defendant has received instructions that the moneys should be turned

over to said H. J. Frolich. He therefore answers that there is no money due H. A. Campbell."

On July 23, 1919, appellant replied, controverting respondent's answer so made, alleging that larger sums were due from the garnishee defendant lumber company to Mr. and Mrs. Campbell at the time of the service of the writ of garnishment upon the garnishee defendant lumber company, and that the assignments of such indebtedness by them was void as to him, particularly because such assignments were made long after the service of his writ of garnishment upon the garnishee defendant lumber company. The issues as to Mr. and Mrs. Campbell being indebted to the garnishee defendant lumber company thus raised being heard upon the merits, the trial court, on September 15, 1919, rendered its final judgment as follows:

"It is ordered that W. A. Moore, receiver, is not indebted or has he any personal property in his possession belonging to A. H. Campbell.

"It is further ordered that W. A. Moore, as receiver of the Campbell-Moore Lumber Co., is indebted to Carrie E. Campbell in the sum of \$811.45, and that Hans Oberleitner, the plaintiff herein, is entitled to such dividends as may be declared on said \$811.45."

This is the judgment from which this appeal is prosecuted.

It is apparent from recitals in the final judgment appealed from, which for present purposes we may regard as findings and conclusions duly excepted to, that the trial court rested its conclusion that there was nothing owing from the garnishee defendant lumber company or Moore, as its receiver, to Mr. Campbell available to appellant, upon the fact of his failure to reply to and controvert the original answer of the garnishee defendant lumber company; and that therefore the first judgment directing the sale of Mr. Campbell's

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shares of stock became *res judicata* as against appellant, even to the extent of precluding him from further insisting that the garnishee defendant lumber company was indebted to Mr. Campbell. We think, however, under the circumstances, that judgment was not *res judicata*, as against appellant, as a determination of the question of whether or not the garnishee defendant lumber company was indebted to Mr. Campbell; and that, until that issue was thereafter tried and determined, appellant was privileged to reply to and controvert either the answer made by the garnishee defendant lumber company in the first instance, or the answer thereafter made by respondent Moore as its receiver. The latter answer was replied to and controverted by appellant and raised an issue as to the garnishee defendant lumber company being indebted to Mr. Campbell, triable together with the issue of whether or not the garnishee defendant lumber company was indebted to Mrs. Campbell. Upon the final hearing it clearly appears that the garnishee defendant lumber company did, at the time of the service of the writ of garnishment upon it, owe Mr. Campbell \$700, and that it was not until after the service of the writ of garnishment and the passing of the garnishee defendant's affairs into the hands of respondent as receiver because of its insolvency that any assignment was made by Mr. Campbell of the \$700 indebtedness due him, when such assignment was manifestly made for a past consideration. We think it follows that the trial court erred in declining to award judgment in favor of appellant and against respondent as receiver, and adjudge appellant entitled to such dividends as would be payable to Mr. Campbell upon the indebtedness of \$700 owing him, to an extent necessary to satisfy the judgment in favor of appellant against Mr. and Mrs. Campbell.

Contention is made in appellant's behalf that the court erred in refusing to award him judgment entitling him to dividends in a larger sum than \$811.45, as against the respondent as receiver, upon the indebtedness owing Mrs. Campbell. While it is true that all of Mrs. Campbell's claim of some \$2,800 appears to have been assigned by her after the service of the writ of garnishment, we are unable to say from the record before us that the trial court erred in refusing to render available to the appellant dividends upon a larger sum towards the satisfaction of his judgment against Mr. and Mrs. Campbell, since it appears that the assignments of Mrs. Campbell's claim in excess of \$811.45 were made to persons who, in equity and good conscience, were entitled thereto as against appellant. That is, so far as we can determine from the record before us, we cannot say but what it sufficiently so appeared to warrant the court in so concluding. The record before us is not clear touching this question, and while the statement of facts seems, by the certificate of the trial judge, to contain all the facts, it is apparent from a perusal of the whole of the statement of facts that there were other facts properly considered by the trial judge which do not appear in the statement of facts. So, upon the record before us, we are unable to say that the trial court erred in refusing to adjudge that there was a greater sum than \$811.45 owing from the garnishee defendant to Mrs. Campbell applicable to the satisfaction of his judgment against Mr. and Mrs. Campbell.

Some contention is made in behalf of respondent seemingly rested upon the theory that our conclusion here reached will result in appellant being unlawfully paid in full to the detriment of general creditors of the garnishee defendant, Campbell-Moore Lumber

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Company. We think counsel overlooks the fact that appellant is not a creditor of the Campbell-Moore Lumber Company, except only as he stands in the shoes of Mr. and Mrs. Campbell. By our disposition of the case he will receive in dividends only such as they would have received had no judgment been rendered in favor of the appellant in the garnishment proceeding. Of course, appellant will not, in any event, receive more from the dividends than the amount of his judgment against Mr. and Mrs. Campbell. Standing in the shoes of Mr. and Mrs. Campbell, appellant will receive the same dividends and no more than will other creditors of the garnishee defendant lumber company. Manifestly he will receive no unlawful preference.

In the final garnishee judgment the trial court did not, in terms, make any award of costs to either party, and it is now argued in appellant's behalf that he was entitled to costs incurred in the superior court. We think, in view of his success in that court and also in this court, he is entitled to costs in that court. The judgment seems capable of being considered as meaning this; but we make this observation to the end that there be no uncertainty in this particular.

The judgment appealed from, in so far as it adjudges appellant not entitled to judgment against respondent, as receiver and garnishee defendant, upon the \$700 indebtedness owing Mr. Campbell—that is, not entitled to the dividends upon that sum which would be payable to Mr. Campbell, is reversed; and the trial court is directed to correct its judgment, making award to appellant accordingly, as it did with reference to the indebtedness owing to Mrs. Campbell.

The judgment, in so far as it awards appellant recovery upon the \$811.45 indebtedness owing Mrs.

Campbell, entitling the appellant to dividends which would be payable to her on that sum, not exceeding the full satisfaction of his judgment against Mr. and Mrs. Campbell, is affirmed. Appellant is entitled to recover his costs in this court.

HOLCOMB, C. J., MAIN, MITCHELL, and BRIDGES, JJ., concur.

[No. 15880. Department One. September 27, 1920.]

LONA SMITH, *Respondent*, v. A. H. CHAMBERS *et al.*,
Appellants.¹

BOUNDARIES (13)—LOCATION OF LINES—EVIDENCE—SUFFICIENCY. A boundary line between two donation claims is sufficiently shown by the evidence of surveyors who made surveys and testified that it was fixed and recognized since 1874 by monuments fixed in city streets.

ADVERSE POSSESSION (9)—HOSTILE ENTRY—ACTS OF OWNERSHIP—EVIDENCE—SUFFICIENCY. Title by adverse possession of a disputed strip along a boundary line is not shown by evidence that parts have been used for a garden and for piling wood and that grass had been cut upon it, where it was not fenced.

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered November 28, 1919, in favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

Thomas M. Vance, for appellants.

Bigelow & Manier, for respondent.

MAIN, J.—The purpose of this action was to quiet title to a disputed strip of ground and enjoin the defendants from constructing and maintaining a fence which the plaintiff claimed was constructed on her property. In the answer the defendants asserted a right to the disputed property, based both upon a

¹Reported in 192 Pac. 891.

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paper title and upon adverse possession. The trial to the court without a jury resulted in sustaining the plaintiff's claim of title. From the judgment so entered, the defendants appeal.

The respondent is the owner of lots one and two, in block two, of Main street addition to the city of Olympia. Main street addition as platted covered a portion of what is referred to as the Offut donation land claim. The north line of the respondent's two lots would coincide exactly with the north line of the Offut donation claim. The appellants are the owners of certain lots in Capital Place addition to the city of Olympia. This addition covers a part of what is referred to as the Sylvester donation land claim. The south line of the appellants' property would coincide with the south line of the Sylvester claim. The true dividing line between the property of the respondent and of the appellants would be the line between the two donation claims above mentioned. This is recognized by both parties. The strip of ground in dispute is approximately fourteen feet wide. The respondent has occupied her property for many years. Likewise the appellants have occupied their property for a great number of years. If the dividing line between the Offut and the Sylvester donation claims was where the respondent contends it was, then the property in dispute would be included within her paper title. If that line was where the appellants contend it was, then the property in dispute would be included within their paper title. Two engineers, called by the respondent, who were familiar with the property and had made surveys, testified that the dividing line between the Sylvester and the Offut claims was where the respondent contended it was. The engineer called by the appellants testified that he did not know where the true boundary line was between

the Sylvester and the Offut claims, and further, that that line could not be definitely ascertained without locating the monument at the southwest corner of the Sylvester claim, which monument could not be found or located. The trial court found "that the south line of the Sylvester donation claim has been fixed and recognized since 1874 by monuments fixed and established in Main and Water streets in said city at points 21.4 feet south of the north margin of said 18th street, and the same being the north line of the Levi H. Offut donation land claim, and for a like period of time has been recognized as such." Under the evidence, it seems that but one conclusion could be arrived at upon the question as to which paper title covered the property. The property in dispute was included within the property described in the respondent's deed as lots one and two in Main street addition to the city of Olympia.

The next question is whether the appellants have acquired title to the disputed strip by adverse possession. No fence had been erected until about a year and a half or two years prior to the institution of this action. At times since the respondent had owned her property she had used a part of the strip for the purpose of raising a garden thereon. The appellants testified that they, at times, had used a part of it for piling wood, that they mowed hay or grass from a part of it, and had devoted other portions to the raising of vegetables. There is some mention of trees that were planted which would mark the line as claimed by the appellants, but these trees are in a public street and not upon the property in dispute and can have no material bearing in determining the true line. The acts of ownership asserted by the appellants, giving them their full force and effect, are not of that character,

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even if persisted in for a sufficient length of time, upon which title to real estate can be based. *People's Savings Bank v. Bufford*, 90 Wash. 204, 155 Pac. 1068. At the conclusion of the evidence the trial judge was requested to view the property in dispute for the purpose of enabling him to better understand and weigh the testimony. This he did, and is therefore in much better position to understand the exact situation than is this court from the record. After hearing the evidence and viewing the premises, the trial court sustained the respondent's title, and this conclusion is sustained by the evidence.

The judgment will be affirmed.

MACKINTOSH and TOLMAN, JJ., concur.

[No. 15722. Department Two. October 4, 1920.]

STIMSON TIMBER COMPANY, *Respondent*, v. MASON
COUNTY, *Appellant*.¹

TAXATION (91)—ASSESSMENT—REDUCTION OF TAX—EQUALIZATION—POWERS OF BOARD—STATUTES. An over-valuation of real estate through an excessive estimate of standing timber by the county assessor can be corrected by the board of equalization in the first instance without applying to the assessor to correct "manifest error," under Rem. Code, § 9200.

SAME (210) — ASSESSMENT — EXCESSIVENESS — EVIDENCE — SUFFICIENCY. A finding of over-valuation of timber lands is sufficiently sustained by evidence that the county cruise of saw timber thereon exceeded estimates made by several cruisers made for the owners to a much greater extent than the extreme percentage of permissible differences between cruises.

Appeal from a judgment of the superior court for Mason county, Wright, J., entered July 7, 1919, in favor of the plaintiff, in an action to cancel a tax, tried to the court. Affirmed.

¹Reported in 192 Pac. 994.

P. M. Troy and Alden C. Bayley, for appellant.

Reynolds, Ballinger & Hutson, for respondent.

FULLERTON, J.—The respondent, Stimson Timber Company, owns one hundred and sixty forty-acre tracts of land situated in township twenty-three north, of range two west of the Willamette Meridian, according to the United States government surveys. The land is in Mason county, and is subject to assessment for the purpose of taxation in that county. The respondent conceived that, for the year 1916, fifty-three of these tracts were overvalued by the assessor of the county named, and after seeking and failing to obtain relief through the county board of equalization, began this action to cancel the assessments, at the same time tendering to the county taxes on the property measured by a valuation which it deemed to be just. The county refused to accept the tender, and took issue on the allegations of the complaint. The trial resulted in a finding that thirty-eight of the fifty-three tracts were overvalued, and a decree was entered accordingly. The county appeals.

The county assessor, in making up his estimates of the value of the several tracts, took into consideration different elements. He valued the land as land without the timber, he estimated the number of piles and poles upon the land and placed a value upon them, he estimated the quantity of saw timber thereon and valued the same at a given value per thousand feet, and by aggregating these values found the total value of the land. In its complaint the respondent does not complain of the value placed upon the land as land without the timber, nor does it complain of the quantity or values of the piles and poles, nor of the value per thousand feet of the saw timber, but complains that

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the quantity of saw timber estimated to be on the land was greatly in excess of the quantity actually thereon; the result being, in the final aggregate, an overvaluation of the land.

The county assessor found the quantity of timber on the land from a cruise of the timber made by the county in 1909. While the evidence was not directed towards a showing of the fact, it can be gathered from the record that the county, in the year named, caused all of the timber lands within its boundaries to be cruised. The cruise was under the general supervision of one Lewis J. Wade. He was authorized to employ, and did employ, assistant cruisers to make the actual cruise. The cruise of the township of which the lands here in question form a part was made by John T. Leahy. Leahy's cruise of the one hundred and sixty-nine forty-acre tracts therein owned by the respondent showed that there was thereon 206,000,154 feet of saw timber. This quantity of timber was accepted as correct by the chief cruiser and adopted by the county as correct on all of the tracts save the tracts in section thirty-two. On this section Leahy found the saw timber to be 44,476,000 feet. The chief cruiser, apprehending some mistake in the cruise, caused the section to be cruised by another cruiser, going with him over the first half of the section and making a separate estimate. Finding, on completing this half, that their estimates were running practically together, he allowed the cruiser to complete the second half alone. This cruiser found a total of 28,179,000 feet of saw timber on the section, and this quantity was adopted by the chief cruiser and the county as the true quantity of saw timber on this section. On the fifty-three forty-acre tracts of which complaint is made, Leahy's cruise shows 85,326,000 feet of saw timber.

The respondents, in 1909, also caused all of their holdings in this township to be cruised. The cruise was made by one Raberge, who estimated the saw timber at 177,830,000 feet. On the fifty-three forty-acre tracts he found 59,080,000 feet of saw timber. The respondents also caused the fifty-three tracts in dispute to be cruised in 1916 by one Bryan. He reported the tracts to contain 60,340,000 feet of saw timber. A third cruise was made at the instance of the respondent by one Burnett in 1918. This cruiser omitted cruising one tract by mistake, and certain others had been cut over. He reported 51,675,000 feet of saw timber. Adding to this the number of feet Bryan found on the omitted tracts, his cruise would make the total 61,065,000 feet.

As we have said, the trial judge allowed a reduction on thirty-eight only of the fifty-three tracts of which complaint was made. Comparing the county cruise with the cruise of each of the respondent's cruises, an over-run in quantity appears in the county cruise on each of the fifty-three tracts. The reason for allowing a reduction in part only does not appear in the record, unless it was from the following circumstances: Each of the cruisers testified that a cruise of timber is at best only an estimate of quantities, more or less close owing to the care taken by the cruiser. They testified, also, that variations in the estimates of different cruisers of from five to ten per centum were usual, and one of them testified that a variation of fifteen per centum between different cruises did not argue that either cruiser had been careless. While we have not compared the differences on each of the protested forty-acre tracts, a comparison of isolated instances seems to indicate that the trial judge disallowed a reduction on each of the tracts where the percentage did not

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exceed the extreme of these permissible variations. It may be added that the differences in the estimates between the cruise made by the county and the largest cruise made by the respondent's cruisers on the tracts on which reductions were allowed exceeds forty-five per centum.

The statute (Rem. Code, § 9200) provides that the county commissioners, the county assessor, and the county treasurer shall form a board for the equalization of assessments upon property within the county. The board is given power to raise the valuation of each tract of real property which in their opinion is returned by the assessor below its true and fair value, and power to reduce the valuation on any tract which in their opinion is valued by the assessor in excess of its true or fair value. The county assessor is made the clerk of the board, with the duty of keeping an accurate record of the proceedings of the board, and of making the changes in values on the assessment rolls directed by the board of equalization. The statute further provides:

“The county assessor shall make a record of all errors in descriptions, double assessments, or manifest errors in assessment appearing on the assessment-list at the time of the extension of the rolls, and after duly verifying the same, file said record with the county board of equalization on the third Monday in November next succeeding the annual meeting of the county board of equalization. The county board of equalization shall reconvene on such day for the sole purpose of considering such errors in description, double assessments, or manifest errors appearing on the assessment-list at the time of the extension of the rolls, and shall proceed to correct the same, but said board shall have no authority to change the assessed valuation of the property of any person, or to reduce the aggregate amount of the assessed valuation of the taxable property of the county, except only in so far as the same

may be affected by the corrections ordered based on the record submitted by the county assessor." Rem. Code, § 9200.

Based upon the foregoing provisions of the statute, the appellant first contends that the respondent is without right to maintain the present action. It calls attention to the rule that an action for the reduction of an assessment will not lie until the complainant has sought and failed to obtain relief from the proper assessing officers, and contends that, in this instance, because of the nature of the complaint, the proper officer to grant relief was the county assessor and not the board of equalization. The contention is founded on the fact that the respondent does not complain of the valuation placed upon the land as land, nor of the valuation placed upon the piles and poles, nor of the valuation per thousand feet placed upon the saw timber, but complains only that the assessor returned a greater quantity of saw timber as existing upon the land than actually existed thereon, and this error, it is said, it was the duty of the assessor to correct, not the duty of the board of equalization, and hence complaint to that body alone was insufficient. But we cannot think the contention tenable. The property was valued on the assessment rolls as land, and the complaint, in its ultimate effect, was a complaint of an over assessment of the land. This it sought to have reduced, and clearly, under the express provisions of the statute, the board of equalization alone has this power, and was the proper body before whom to make complaint. It was not an error in description, nor a double assessment, nor a manifest error appearing on the assessment roll which the assessor is empowered to correct, but was an overvaluation, made, it is true, because the assessor over-estimated the quantity of

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saw timber on the land, but an error nevertheless cognizable before the board of equalization.

There is nothing decisive in the case of *Simpson Logging Co. v. Chehalis County*, 80 Wash. 245, 141 Pac. 344, that is contrary to what we here decide. In that case, like the one now before us, the plaintiffs did not complain of the value per thousand feet that the assessor had placed upon the timber, but complained because the assessor had over-estimated the quantity of timber. Passing upon the case, we did say that, for the purposes of the decision, we would assume, but not decide, that "when the question is one of quantity, the same rules of law apply as when the controversy is over value"; but it was not determined that the board of equalization was not the proper body before whom to make complaint. The most that can be claimed for the case is that the question was left undetermined, and is not authority for either view.

The facts as we have hereinbefore outlined them are not in substantial dispute. They show a radical difference between the estimate of the cruiser for the county and the cruisers for the respondent as to the quantity of saw timber on all of the tracts on which the trial court allowed a reduction—a difference sufficient to warrant the relief granted by the court under the principles governing in such cases, if the cruise of the respondent is to be accepted as the correct estimate. *Northern Pac. R. Co. v. Pierce County*, 55 Wash. 108, 104 Pac. 178; *Heuston v. King County*, 90 Wash. 200, 155 Pac. 773; *Grays Harbor Const. Co. v. Grays Harbor County*, 99 Wash. 184, 168 Pac. 1138.

The remaining question therefore is, which of these cruises is entitled to the greater credence. On this question the parties have submitted extended arguments. These we shall not follow in detail. Briefly,

the appellant's contention is that the difference between the estimated quantities of timber on the protested tracts, made by the cruisers for the respondent on the one side and the appellant's cruiser on the other, can be accounted for by the fact that the county cruiser found the correct boundaries of the tracts, whereas the respondent's cruisers did not. In support of this it is pointed out that the difference between the quantity of timber found by the county cruiser on the respondent's entire holdings and the quantity found thereon by the respondent's cruiser Raberge (the only one of the cruisers who cruised its entire holdings) is close to the range of permissible differences, and that in a number of instances Raberge's cruise on a particular tract overruns the cruise of the county. But to this we think there is a conclusive answer. It is at once manifest that, if a difference in quantity appeared on a particular tract because the cruisers did not find the same or similar boundaries, an overrun would be found on the abutting or adjacent tracts. The respondent's counsel has tabulated the cruises of Raberge and of the county by separate forty-acre tracts on the respondent's entire holdings, and this tabulation shows that in only a few instances does the Raberge cruise show an excess over the county cruise on the adjacent tracts. And in these instances, with possibly one exception, the increase is but slight, while the county overrun on the protested forty is in excess of one-third in quantity.

We have not overlooked the testimony of the county cruiser, on which the appellant places much reliance, namely:

"I have checked over a considerable of my work—my field work—with Mr. Raberge's field work on this identical land in question here. In checking it over I found this difference, I found instances where there

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was an overplus on one of the forties here, and that in comparing my cruise of the adjoining forty with his cruise of the adjoining forty, I would find a less amount than his. I found by the figures of the two books where one was claimed to be large, that the difference would make up on the adjoining forty. I found that sharply shown.”

But the witness points out no definite instance where these conditions appear, and we have found none other than these to which we have referred.

This court is always reluctant to interfere with values placed upon property for the purposes of assessment by the county assessor. In the performance of his duties he acts in a quasi-judicial character, and the law presumes that he has performed his duty in a proper manner. This presumption, as we have repeatedly said, is liberal, and his valuations are not to be set aside except upon clear and convincing proofs of excessive overvaluation. But the taxpayer has rights also, and in this instance we are not prepared to hold that the tracts adjudged by the trial court to be excessively overvalued were not in fact so.

The judgment is affirmed.

HOLCOMB, C. J., MOUNT, BRIDGES, and TOLMAN, JJ.,
concur.

[No. 15776. Department Two. October 4, 1920.]

FRANK MORTON *et al.*, *Appellants*, v. WALKER D. HINES,
as Director General of Railroads, Respondent.

E. J. SCHANK *et al.*, *Appellants*, v. WALKER D. HINES,
*as Director General of Railroads, Respondent.*¹

WATERS (55, 56)—OBSTRUCTIONS—SURFACE WATERS—FLOODS—EVIDENCE OF DEFLECTION—SUFFICIENCY. A bridge pier is not shown to have been the cause of overflowing the left bank of the stream in the time of an unusual freshet, where the angle of the pier was shown to have a tendency to deflect the water to the other bank, the river turned sharply to the right below the bridge, naturally tending to deflect the current to the left bank, and the freshet was the highest known in sixteen years, and inundated both banks for great distances both above and below the bridge.

WATERS (55)—SURFACE WATERS—LIABILITY. Waters escaping from the banks of a river at times of flood are surface waters which an owner may lawfully protect against by embankments, even though the effect is to cast the increased flow upon other lands.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered September 26, 1919, upon granting a nonsuit, dismissing consolidated actions for damages for overflowing lands, tried to the court and a jury. Affirmed.

C. D. Cunningham and *Forney & Ponder*, for appellants.

Bogle, Merritt & Bogle, for respondent.

FULLERTON, J.—The appellants Morton and wife and the appellants Schank and wife brought separate actions against the respondent, Walker D. Hines, as director general of railroads, to recover in damages for injuries to their real property, alleged to have been caused by the wrongful acts of the respondent while in the maintenance and operation of the railroad of

¹Reported in 192 Pac. 1016.

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the Oregon-Washington Railroad & Navigation Company, of which he was then director. After issue had been joined on the complaints, the causes were consolidated for trial, and a trial entered upon before the court sitting with a jury. At the conclusion of the evidence on behalf of the appellants, a challenge to the sufficiency of the evidence was interposed by the respondent, which the court sustained, entering a judgment of dismissal in each of the actions. Appeals were separately taken, but were consolidated in this court for hearing, and we will notice them as a single proceeding.

The appellants' properties are situated in the town of Galvin, in Lewis county. The line of railroad of the railroad company named, as it approaches the town from the east, runs in a northwesterly direction, and crosses the Chehalis river about one-fourth of a mile before it reaches the town. The Chehalis river is a considerable stream. The railroad crosses it on a bridge, some two hundred and eighty-six feet long, which rests on three piers, one on the west bank of the river, one near its center, and one near the eastern bank. It crosses diagonally, deflecting from a right angle between twenty and thirty degrees, the western end of the bridge being lower down the stream than the eastern end. The pier in the center is at right angles to the course of the bridge, and consequently sets diagonally with the course of the stream. The railroad and bridge were constructed in the year 1910. As originally constructed, the railroad track between the river and the town of Galvin ran over a trestle built upon piling driven in the ground and was between eight and ten feet high. On the left side of this trestle were private homes, a dismantled sawmill, and cultivated lands. Opposite were other cultivated lands.

No water course extended over this land, although there were in two place depressions in the surface which might have been eroded by running water at some former period. The slope of the land is downward from the river until it reaches the limits of the town of Galvin, at which point there is a ridge on which the major part of the town is built. The place at which the railroad intersects the boundaries of the town is some ten feet lower than the elevation at the bridge. The respondent's properties were practically at this lower level, although protected from the river by a ridge some two feet higher than the surrounding levels. In 1918, the respondent caused the trestle to be filled with earth, gravel and rock between the river and the town of Galvin, making a solid roadbed for the entire distance, save for two openings left at the depressions mentioned, sixteen feet in width.

The Chehalis river, for some distance above and for a short distance below the railroad bridge, makes a somewhat gradual curve to the right or east. From the latter point it curves sharply still further towards the east, continuing its course for a distance of perhaps a quarter of a mile, where it turns in a half circle to the west, flowing in the opposite direction from, and almost parallel with, the last course mentioned. It continues on this course for some distance, then curves to the south, where it is met by a creek called Lincoln creek, when it turns and flows in a course slightly west of north. The distance from the bridge to the mouth of Lincoln creek, following the course of the river, is two and one-eighth miles. In a direct line the distance is three-fourths of a mile.

In January, 1919, a freshet occurred in the Chehalis river. It overflowed its banks on both sides for a considerable distance both above and below the railroad

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bridge, flooding the adjoining and adjacent territory. It was these flood waters that injured the appellants' property, and it is to recover for this injury that the present actions are prosecuted. The grievances and contentions of the appellants' are clearly stated by their counsel in the following language:

"In order to make our position plain at the outset we will say, in an epitomized form, that our grievance against the defendant, based upon the evidence, is that he did, by means of a bridge pier, turn the waters of the river out of the channel, which he had no lawful right to do; that these same waters, after he had turned them from the stream, he continued to control, and collected into a mass by means of his railroad embankment, and cast them into a torrential body upon the lands of plaintiffs, to their damage. As to this latter act we shall contend that defendant had no right in law, to direct against plaintiffs, artificially and en masse, the water which he had himself, by his own unlawful acts, forced out of a natural water course, because it is not what the law regards as surface water, at least the law will not permit him to treat it as surface water, but it continues to be and remains the water of a stream, diverted from its natural and accustomed course, and compelled to seek a new channel across plaintiffs' land. And we shall go even further and meet counsel on his own chosen ground, and show that, even if counsel can construe this artificially diverted flood to be surface water, yet defendant had no lawful right to treat it as he did, by casting it in a body and in an unusual manner upon plaintiffs."

The bridge pier referred to by counsel is the pier set in the center of the stream under the railroad bridge mentioned. But that this caused the overflow, or aided in any manner in causing it, we can find no evidence in the record to support. The pier was wedge shaped at its upper end, and certain of the witnesses testified that the current of the river, on striking the west face of the wedge, was deflected off to-

wards the west bank. But, as we have shown, the pier was set diagonally with the current, the upper end of the pier farther west than the lower end, and clearly, for physical reasons, the greater tendency of the pier was to deflect the water towards the other side of the stream. It was testified, also, that the current of the river approached the left bank some five hundred feet below the bridge. But here again the fact is sufficiently accounted for by natural causes. Flowing water, like any other moving, inanimate substance, moves in a straight line until interfered with by some counteracting force. At the point mentioned, the river turns sharply to the right, and the tendency of the current would for this reason, regardless of interferences five hundred feet above it, crowd against the river's left bank.

But there is another all sufficient reason for saying that the bridge pier was not the cause of the overflow. This freshet was the greatest known on the river for at least sixteen years, if not the greatest known in local history. It covered a great area of land lying to the right of the river, all of the area lying to the left of the river within the bend described, save two small areas, in one of which the town of Galvin was in part located, and another a short distance from the town towards the northeast, and a great area lying to the southwest of the fill. The water formed a vast lake. It overflowed the banks of the river for great distances, both above and below the railroad bridge. Under these conditions, it is idle to say that the bridge pier had aught to do with the cause of the inundation.

But there was evidence tending to show that the usual course of the current of the water escaping from the river immediately below the railroad bridge was over the lowlands between the bridge and the town of

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Galvin, from whence it flowed around the highlands on which the town was situated, returning to the river by way of Lincoln creek, and that filling the trestle with a solid embankment dammed this current, causing it to take another course to the creek, which course it found over the appellants' lands. While the appellants seemingly so contend, the evidence does not justify the conclusion that their properties would not have been inundated had the embankment not existed. The most that can be claimed is that the direction of the current of the water was changed by the embankment, and that this current caused the land to wash, which it would not have done had the water been free to follow the natural slope of the ground.

But we cannot follow the appellants' counsel in their contention that this fact, assuming it to be established by the evidence, vests in the appellants a right of recovery. This court has adopted the outlaw doctrine as to surface waters. *Cass v. Dicks*, 14 Wash. 75, 44 Pac. 113, 53 Am. St. 859; *Harvey v. Northern Pac. R. Co.*, 63 Wash. 669, 116 Pac. 464; *Wood v. Tacoma*, 66 Wash. 266, 119 Pac. 859; *Miller v. Eastern R. & L. Co.*, 84 Wash. 31, 146 Pac. 171. Waters escaping from the banks of a river at times of flood are surface waters, and are waters which an owner of land may lawfully protect against by dikes and fills on his own property, even though the effect is to cause an increased flow of water on the lands of another to the damage of his lands. *Harvey v. Northern Pac. R. Co.*, *supra*, is similar in its facts to the situation here. There the railway company had made a similar fill to the one now in question, which had the effect of preventing overflow water from the Snohomish river from spreading over a low bottom as it had been wont to do prior to the making of the fill, and causing it to flow in an increased

volume along the fill and discharge upon the complainants' property. We held there could be no recovery, using this language:

"Appellant further contends that, even though the water causing this damage be held surface water, the respondent is nevertheless liable for such damage, because it has collected and diverted such water from its usual course, and discharged it upon appellant's land in a quantity greater than, and in a manner different from, its natural flow. This contention cannot be sustained. Respondent has not collected the water on its right of way and thereafter discharged it upon appellant's premises. It was entitled to protect itself against the water escaping from the banks of the river, and could only do so by some method which would prevent it from flowing upon and over its lands, and this it did. When prevented from flowing upon respondent's land by the embankment, the water necessarily continued its flow along the general course of the river until it reached a point where, for want of obstruction, it was discharged upon appellant's land. Respondent has done nothing further than to exercise its common law right of protection against surface water. It is to be presumed that appellant may do the same. The allegations of his amended complaint do not show that he has done so, and any injury he may have suffered is regarded under the law of this state as *damnum absque injuria*."

The appellants cite the cases of *Peters v. Lewis*, 28 Wash. 366, 68 Pac. 869; *Noyes v. Cosselman*, 29 Wash. 635, 70 Pac. 61, 92 Am. St. 937; *Sullivan v. Johnson*, 30 Wash. 72, 70 Pac. 246, and *Holloway v. Geck*, 92 Wash. 153, 158 Pac. 989, as authoritative on the question here involved. In these cases the owners of property sought to rid their lands of surface and percolating waters, and more or less permanent water beds, which were wont by nature to collect or rest thereon, by confining the water to artificial channels and casting it in

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a body on the lands of the adjoining proprietors. In the present case, and in the several cases we have cited as analogous in principle, the proprietors were but fencing their own lands against the encroachment of surface water arising from sources apart and away therefrom. Owing to these differences in the facts, this court has applied to them different principles of law, holding in the one class of cases that the acts were wrongful and subject to restraint by the courts, and in the other that the land proprietors acted within their just rights. It may be, as the appellants' learned counsel very forcibly argue, that it is hard to justify these differences by any well defined legal principles, but it is a difference, nevertheless, which this court has made from the earliest times and has become a settled rule of property. More harm would follow a departure from the rules than from an adherence to them.

The judgment is affirmed.

HOLCOMB, C. J., MOUNT, BRIDGES, and TOLMAN, JJ.,
concur.

[No. 15985. Department One. October 4, 1920.]

*In the Matter of the Application of BERNARD PARENT
for a Writ of Habeas Corpus.*¹

HABEAS CORPUS (22)—COMMITMENT FOR CONTEMPT—SCOPE OF INQUIRY. Upon habeas corpus proceedings to release a prisoner, a commitment by a court of competent jurisdiction adjudging him guilty of contempt in violating an injunction and sentence to imprisonment for a definite term, shows legal cause for the imprisonment which cannot be inquired into.

CONTEMPT (28)—CRIMINAL OR CIVIL PROCEEDING. A commitment for violating an injunction negatives the idea that it was "to enforce a remedy of a party" within the meaning of Rem. Code, § 1075, subd. 2, and is a criminal, rather than a civil proceeding, where the injunction was issued at the instance of the prosecuting attorney for the preservation of order and the protection of the public in general.

HABEAS CORPUS (5, 8-1)—GROUNDS FOR RELIEF—JURISDICTION—ERRORS AND IRREGULARITIES. The validity of a judgment of a court of competent jurisdiction cannot be tested in habeas corpus proceedings, no matter to what extent error may have been committed and even though the judgment was voidable because of want of jurisdiction to render it, where the court had jurisdiction of the subject-matter and erroneously decided the question of its jurisdiction of the case.

INJUNCTION (73)—VIOLATION—JUDGMENT OF CONTEMPT. The superior court has jurisdiction to adjudge one guilty of contempt of court for violating its injunction, and to sentence such person to jail for a specified period.

Application filed in the supreme court July 22, 1920, for a writ of habeas corpus to release a person held in custody upon conviction of contempt of court. Denied.

Leslie B. Sulgrove and *George F. Vanderveer*, for petitioner.

Joseph B. Lindsley and *William C. Meyer*, for respondent.

¹Reported in 192 Pac. 947.

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PARKER, J.—The petitioner, Parent, is restrained of his liberty in the custody of the sheriff of Spokane county, imprisoned in the county jail of that county. He seeks in this court a writ of habeas corpus directed to the sheriff, to the end that he be released from such imprisonment. By consent of counsel for petitioner and the prosecuting attorney for Spokane county, representing the sheriff, the question of the legality of petitioner's imprisonment was heard in this court upon his petition for the writ, an order directed to the sheriff to show cause why the writ should not issue, and the sheriff's answer and return.

By the return of the sheriff, which is not controverted, the petitioner is held as a prisoner in the county jail of Spokane county by virtue of a commitment issued out of the superior court of that county, reading as follows:

“State of Washington, Plaintiff,

vs.

“Bernard Parent, Contemner.

No. 60662

Commitment.

“To the sheriff and keeper of the county jail in and for Spokane county, state of Washington:

“This is to certify that heretofore the above named defendant in the above entitled cause was duly convicted of the crime of contempt of court and violation of injunction of this court, and that he, the said defendant, was on the 8th day of July, 1920, sentenced by the Honorable R. M. Webster, judge of the above entitled court, to be confined in the county jail in and for said county and state for the period of four (4) months and to pay the costs of prosecution taxed at twelve and no/100 dollars.

“Now, therefore, you, the said sheriff, are hereby ordered in the name of the state of Washington forthwith to convey the said defendant to the said keeper of said jail, and you, the said keeper, are hereby ordered to receive the said defendant into your cus-

tody in said jail and him there safely keep until he shall thence be discharged by due course of law.

“Done in open court this 8th day of July, A. D. 1920.

“Witness the Honorable R. M. Webster, Judge of the above entitled court.

“Seal of superior court Amery P. Gilbert, Clerk,
of Spokane County, By Frank C. Nash, Deputy.
Washington.”

That this commitment, upon its face, shows legal cause for the petitioner's imprisonment by the sheriff, issued, as it was, out of the superior court, a court of record and general jurisdiction, it seems to us is beyond question. Indeed, we do not understand counsel for petitioner to seriously contend that the commitment does not, upon its face, show legal cause for his imprisonment. It is contended, however, that when the commitment and the judgment of contempt upon which it was issued are viewed in the light of the proceedings leading up to his conviction and commitment, including the injunction decree and the record in the injunction case, it does become apparent that petitioner's imprisonment is illegal and without authority of law. By express statutory provisions, we are precluded in a habeas corpus proceeding from making inquiry touching the legality of the petitioner's imprisonment, beyond the commitment and the judgment upon which it is issued, when such judgment is rendered by a court of competent jurisdiction, except when the commitment is issued upon an order of contempt looking to the enforcement of a remedy awarded a party by an order or judgment of the court. In § 1075, Rem. Code, relating to habeas corpus, we read:

“No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following:

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"1. Upon any process issued on any final judgment of a court of competent jurisdiction.

"2. For any contempt of any court, officer or body having authority in the premises to commit; but an order of commitment as for a contempt upon proceedings to enforce the remedy of a party, is not included in any of the foregoing specifications:"

Contention is made in petitioner's behalf that our inquiry is not limited in this case to the judgment of conviction and the commitment issued thereon by virtue of which petitioner is imprisoned, because the contempt judgment is "to enforce a remedy of a party," within the meaning of the concluding language of subd. 2, of § 1075, above quoted. This contempt judgment plainly negatives the idea that it was intended as a coercive measure to compel the petitioner to do something looking to the satisfaction of a judgment rendered awarding a party any relief as to his property rights. Petitioner was not committed to prison, there to remain until he did something that he was by the court ordered to do, but was adjudged guilty "of the crime of contempt and violation of the injunction of this court (superior court)," and sentenced "to be confined in the county jail in and for said county and state for the period of four (4) months." In other words, the judgment was purely one of punishment for a past act, and not one of mere coercion from the effect of which petitioner could relieve himself by compliance with the original injunction decree.

Our attention is called to decisions of this court in *In re Van Alstine*, 21 Wash. 194, 57 Pac. 348, and *In re Coulter*, 25 Wash. 526, 65 Pac. 759, as lending support to the contention here made in petitioner's behalf that the contempt judgment rendered against him was to enforce a remedy awarded in the injunction proceed-

ing, within the meaning of the concluding language of subd. 2 of § 1075, above quoted. In the *Van Alstine* case, the original order and judgment was that the petitioner and her codefendant pay into the court a sum of money within a certain time, failing to do which, contempt proceedings were brought against them with a view of coercing them to obey such order and judgment, resulting in an order of contempt that they "be confined and imprisoned in the county jail of King county, state of Washington, until they shall comply with and have performed the provisions of the decree; that is to say, until they, the said Lou Van Alstine and Emma Norton, shall have brought into and deposited in the registry of this court said sum of thirty thousand nine hundred and sixty-five dollars." Plainly that was a purely civil contempt proceeding looking to the coercion of petitioner and her codefendant satisfying the order and decree of the court. Upon petitioner's application for a writ of habeas corpus to be relieved from the imprisonment so adjudged against her, the court did inquire into the validity of the original decree and order for the payment of money into the court, and finding that the contempt order and judgment was without warrant because the order and decree for the payment of the money into court could not be lawfully so enforced, she was discharged from imprisonment, under the exception as to the limit of inquiry in habeas corpus proceedings found in the concluding language of subd. 2, § 1075, above quoted. Plainly that is not this case. It was exactly the kind of a case contemplated by the exception found in the statute.

In the *Coulter* case, the petitioner for the writ, seeking to be discharged from imprisonment, had a money judgment rendered against him, and failing to satisfy

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the same, he was charged with contempt, resulting in a judgment and commitment which it seems, from the language of the court's opinion, in terms, sentenced him to imprisonment in the county jail for a period of ninety days. A critical reading of that decision, we think, renders it plain that this court assumed, rather than decided, that the contempt order and judgment was one of coercion looking to the compelling of the payment of the judgment by the petitioner, rather than one of punishment as a criminal contempt. Apparently that question was not given serious consideration either by counsel or the court. Had it been a seriously debated and considered question in the case, we do not think it possible that the court would have held that the contempt order and judgment was other than one of a criminal nature and not merely coercive looking to the satisfaction of the judgment; unless the contempt order and judgment did in terms, other than those briefly mentioned in the opinion, enable the petitioner to purge himself of the contempt by satisfying the judgment. It is possible some such fact not appearing in the opinion induced the court to regard the contempt judgment as merely coercive.

Should we look beyond the contempt judgment in this case to the proceedings leading up to it, including the proceedings and decree in the injunction case, we would find that the injunction decree was not rendered looking to the securing of the individual property rights of any party to that case. As disclosed by the petition for the writ in this case, the injunction was issued at the instance of the prosecuting attorney for Spokane county, looking merely to the preservation of the peace, good order, and protection of the public in general. Thus it would also clearly appear, as it does upon the face of the contempt judgment itself, that it

is not of that class which enables this court to look beyond the judgment and commitment in habeas corpus proceedings with a view of determining the legality of petitioner's imprisonment. If this is not a pure criminal contempt proceeding under the first part of subd. 2 of § 1075, above quoted, and is not a final judgment within the meaning of paragraph 1 of that section, then it seems to us there is no such thing as a criminal contempt proceeding as distinguished from a civil contempt proceeding touching the violation of court orders and judgments. If this be not the correct view of the law, then all contempt proceedings prosecuting against a party because of his violation of an order or judgment of a court are civil contempt proceedings and merely coercive in their nature, looking to the enforcement of the order or judgment claimed to be violated. Observations made by us in *Snook v. Snook*, 110 Wash. 310, 188 Pac. 502, point out that there is a marked distinction between criminal and civil contempt proceedings and judgments rendered therein. The former looks to punishment purely as such. The latter looks only to coercion to compel compliance with an order or judgment calling for the doing of some act by the accused. We are quite convinced that this proceeding belongs to the former and not to the latter class; and that the judgment of conviction as for contempt rendered in this case is as conclusive and final as a specific punishment judgment rendered in a purely criminal case.

That this judgment was rendered by a court of competent jurisdiction, speaking generally, that is, by a court having jurisdiction to render such a judgment of contempt, it being rendered by a court of general jurisdiction, we think is elementary law. Whether or not the court acted erroneously, even to the extent of

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acting beyond its jurisdiction in the particular case, is, we think, not a question to be considered in this habeas corpus proceeding. It has become the settled law of this state by our decision in *In re Newcomb*, 56 Wash. 395, 105 Pac. 1042, that the validity of a judgment of a superior court cannot be tested in habeas corpus proceedings, no matter to what extent error may have been committed in its rendition, even though such judgment may be voidable because of want of jurisdiction in the court to render such judgment; because the very question of whether or not the court had jurisdiction in the particular case, it having jurisdiction of the subject-matter, speaking generally, is one of the questions for the court itself to decide in the first instance. In other words, that the erroneous decision of the superior court, a court of general jurisdiction, as to it having jurisdiction of the particular case is, in its last analysis, only the commission of error by that court. In the *Newcomb* case, there was sought to be drawn in question in a habeas corpus proceeding the very existence of the law under which Newcomb was convicted, he seeking to be released from imprisonment by habeas corpus upon the ground that there was no law in existence rendering the act done by him punishable at the time of the commission of the act. Referring to this question so sought to be drawn into the habeas corpus proceeding for decision therein, Chief Justice Rudkin, speaking for the court, said:

“The superior court was vested with full and complete jurisdiction to determine that question, and whether its determination was right or wrong its jurisdiction to hear the case continued and its final judgment is not void. The authorities are by no means agreed upon the proposition, but in our opinion, if a court of general jurisdiction determines a question of law or fact, properly before it in the exercise of its

acknowledged jurisdiction, its determination cannot be void, however erroneous it may be."

And after reviewing numerous authorities, the Chief Justice further said:

"After a full and exhaustive examination of the authorities, we are convinced that the judgment of the superior court of Pierce county is not void for any of the reasons assigned. That court had full and complete jurisdiction to determine every question here presented, and its determination is not and cannot be void. We are further of the opinion that where a party is held in custody under process issued on the final judgment of a court of competent jurisdiction, or upon a warrant issued from the superior court upon an information or indictment, he is not entitled to his discharge on habeas corpus unless such process or judgment be void, and a judgment is not void simply because the court decided erroneously some question properly before it and within its acknowledged jurisdiction. In habeas corpus matters we exercise original, not appellate jurisdiction."

It may be that there was error, both in the injunction and contempt proceedings, which if properly presented here would call for the reversal of the judgments rendered therein; but manifestly, under the law as now settled in this state, it is not our privilege to review or test the correctness of either of those judgments in this proceeding. When petitioner was adjudged guilty of contempt and committed to the county jail by the judgment here in question, ample remedy was afforded him to have that judgment reviewed and set aside, if erroneous—and the same may be said as to the injunction decree—by appeal to this court, or by review, if appeal be inadequate to effectively secure his rights in that behalf. We conclude that petitioner is not entitled to the writ of habeas corpus, because the judgment of contempt rendered against him was a final

judgment of a court of competent jurisdiction; and though rendered in a contempt proceeding, it was not a judgment "as for a contempt upon proceedings to enforce the remedy of a party."

The writ is denied.

HOLCOMB, C. J., FULLERTON, MAIN, and MITCHELL, JJ., concur.

[No. 15668. *En Banc*. October 4, 1920.]

THE STATE OF WASHINGTON, *on the Relation of Tacoma Eastern Railroad Company, Appellant*, v. PUBLIC SERVICE COMMISSION *et al.*, Respondents.¹

CARRIERS (3-2)—OVERCHARGES—ACTION TO RECOVER—CONDITIONS PRECEDENT—STATUTES. The public service commission has jurisdiction to consider a complaint for a refund of excess freight charges although it relates to transactions prior to the passage of the act of 1911 (Rem. Code, § 8626-91) providing that complaints for overcharges shall be filed with the commission.

APPEAL (477)—DECISION—SCOPE OF DECISION IN GENERAL. It cannot be claimed that a decision upholding the jurisdiction of the public service commission to entertain a complaint for overcharges, and denying the defense of the statute of limitations, was the deciding of questions not involved in the case, where they were properly considered in the case and elaborately argued in the briefs manifestly to the end that an end should be put to the controversy.

CARRIERS (3-4)—CONTRACT—OVERCHARGES—DECISION OF COMMISSION—APPEAL AND REVIEW. A decision of the public service commission in terms ordering a recovery for overcharges on complaint filed by a shipper, pursuant to Rem. Code, § 8626-91, and a judgment on certiorari affirming the same, are not final decisions on the merits reviewable in the courts; since they but give the shipper the right to sue on the award and are merely *prima facie* evidence of the facts stated.

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered October 16, 1919, affirming a decision of the public service commission

¹Reported in 192 Pac. 1079.

ordering the refund of excessive freight charges for log shipments exacted by a carrier. Affirmed.

F. M. Dudley and A. J. Laughon, for appellant.

Ellis & Evans, for respondents.

PARKER, J.—This is an appeal by the Tacoma Eastern Railroad Company from a judgment of the superior court for Thurston county, rendered on October 16, 1918, upon a writ of review, affirming a decision of the public service commission rendered and made on March 28, 1918, that the railroad company refund and pay to respondent Belcher, as assignee of the Tidewater Lumber Company, the sum of \$11,173.77, with interest, as the aggregate of excessive and unlawful freight charges for log shipments exacted from the lumber company by the railroad company.

This controversy is one of long standing between the railroad company and the Tidewater Lumber Company and Belcher, as its assignee. It is claimed by Belcher to be a part of the controversy brought to the attention of the public service commission by a letter addressed to the commission by the traffic manager of the railroad company on December 6, 1915, wherein the railroad company asked to be allowed to cancel certain uncollected switching charges made by it against the St. Paul & Tacoma Lumber Company, and in connection therewith expressing a willingness, and in fact promising, if permitted to do so, to make refund of excessive freight charges exacted from the class of shippers over its line of which the lumber company was one. Upon consideration of this petition, the commission, on March 15, 1916, entered its two orders numbered 2,001 and 2,002; the former authorizing the cancellation by the railroad company of the switching charges, and the latter authorizing the rail-

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road company to make refund of the other admitted excessive freight charges, but making no specific finding or order as to amounts due to any specifically named person or corporation. Thereafter, the railroad company having neglected and refused to refund to the Tidewater Lumber Company, or to Belcher, as its assignee, the sum demanded as excessive freight charges due them, and to which they would be entitled under the order of the commission, Belcher, as assignee of the lumber company, commenced an action in the superior court for Pierce county against the railroad company, seeking recovery of such excessive freight charges exacted by the railroad company from the lumber company. The railroad company's demurrer to Belcher's complaint in that action was sustained, and he declining to plead further, judgment of dismissal was rendered against him. Thereafter he appealed from the judgment of dismissal to this court, which judgment was, on November 14, 1917, affirmed by this court. *Belcher v. Tacoma Eastern R. Co.*, 99 Wash. 34, 168 Pac. 782. All the grounds of demurrer to Belcher's complaint in that action touching his right to recover, including those touching the merits of his claim as disclosed by the allegations of his complaint, were fully reviewed, discussed and decided by this court, all being decided in Belcher's favor, except as to the one question of the necessity of his first filing complaint with the public service commission and seeking an order of the commission requiring the railroad company to refund the claimed excessive freight charges, under § 8626-91, Rem. Code, being § 91, p. 600, Laws of 1911, as a prerequisite to his right to suing for recovery therefor in the courts. Reference to the opinion of this court in that case will disclose a more extended statement of the facts and issues there in-

volved than seems necessary here. We deem it sufficient for present purposes to note that the allegations of the complaint in that action set forth with sufficient particularity the nature and amount of the excess freight charges exacted by the railroad company from the lumber company to show that Belcher, so far as the merits of his claim was concerned, was entitled to a refund, if his claim was saved from the bar of the general statutes of limitation and the bar of the public service commission law, by the petition of the railroad company asking permission to refund all such excessive freight charges theretofore exacted by it. Judge Webster, speaking for the court in that case, after reviewing the facts as alleged in the complaint, stated the issues and the disposition thereof by the superior court as follows:

“A demurrer was interposed to the complaint upon three grounds: (1) that the court was without jurisdiction of the subject-matter of the action; (2) that the suit had not been commenced within the time limited by law, and (3) that the complaint does not state facts sufficient to constitute a cause of action. From an order and judgment sustaining the demurrer and dismissing the action, upon the refusal of appellant to plead further, this appeal was taken.”

and then proceeded, reviewing at length the question of the court's jurisdiction, including the jurisdiction of the commission to make its order No. 2,002, upon which Belcher's claim was in that case rested; the question of whether or not Belcher's claim was saved from the bar of the statutes by the petition of the railroad company upon which the commission's order No. 2,002 was made; and the question of whether or not the complaint stated a cause of action; all of which questions were elaborately argued by counsel for the railroad company and by the court squarely decided in

favor of Belcher, except the one question as to whether or not Belcher's complaint failed to allege facts entitling him to recover in that particular case, in that he had failed to allege that he had made complaint to the public service commission and obtained an order from the commission requiring the railroad company to make refund to him of the alleged excessive freight charges sought to be recovered. Disposing of this question in concluding his opinion, after deciding all the other questions in favor of Belcher, Judge Webster said:

"It is next insisted that, if it be assumed that the commission had jurisdiction to make the orders and that the petition amounted to a new promise to pay, the order entered by the commission does not comply with the statute and consequently is not the proper basis of an action to enforce collection. This contention seems to be meritorious. Section 91 of the public service commission law (Laws 1911, p. 600) provides as follows:

" 'When complaint has been made to the commission concerning the reasonableness of any rate, fare, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the commission, and the commission shall determine that the public service company has charged an excessive or exorbitant amount for such service, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, with interest from the date of the collection.

" 'If the public service company does not comply with the order for the payment of the overcharge within the time limited in such order, suit may be instituted in any court of competent jurisdiction to recover the same, and in such suit the findings and order of the commission shall be *prima facie* evidence of the facts therein stated. If the complainant shall prevail in such action, he shall be allowed a reasonable attorney's fee, to be fixed and collected as part of the costs of the

suit. All complaints concerning overcharges shall be filed with the commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one year from the date of the order of the commission.' Rem. Code, § 8626-91.

"The order entered by the commission in this case does not designate the individual shippers from whom the discriminatory exactions had been collected, nor does it ascertain or fix the amount due each. Section 91 of the act clearly contemplates that the commission must determine the amount of the overcharge in the first instance and its order constitutes the basis of the shipper's right of action in the superior court, in the event the public service company fails or refuses to comply with the order as entered by the commission. Under the holding in *Hewitt Logging Co. v. Northern Pac. R. Co.*, *supra*, the appellant must first submit the claims to the public service commission and have the amount due determined by it and if, when this is done, the respondent refuses to comply with the order, institute an action in the superior court to enforce the collection of the amount found due. We deem it proper to say that the order of the commission constitutes the basis of appellant's right to apply to the public service commission within two years from the date of the order to have the amount of excess payments ascertained, and in the event the railroad company refuses to pay, appellant has the additional period of one year provided by the statute within which to commence an action in the superior court to enforce obedience to the order.

"We conclude, therefore, that upon the ground that the superior court did not have jurisdiction in the first instance to pass upon appellant's claims and to ascertain the amount due the Tidewater Lumber Company, the demurrer to the complaint was properly sustained and the judgment of the lower court is affirmed, but without prejudice to appellant's right to proceed in the collection of his demands in the method indicated in this opinion."

Thus we think it is rendered plain that, since that action was commenced after the passage of the act of 1911, Belcher failed therein, so far as the allegations of his complaint were concerned, solely because of his failure to first present his claim to the public service commission and obtain an order thereon as prescribed by the act of 1911.

Contentions are here again made in behalf of the railroad company challenging the jurisdiction of the public service commission to consider Belcher's claim, rested upon the theory that the claim is not only barred by the statutes of limitation, but that the bar of the public service commission law is in effect a bar of jurisdiction as against the public service commission to considering such claims, and also that the public service commission is without jurisdiction to consider such claim because it relates to transactions occurring and concluded prior to the passage of the act of 1911. It seems to us that the decision of this court in *Belcher v. Tacoma Eastern R. Co.*, *supra*, is decisive as against all of these contentions. It is here argued in behalf of the railroad company that the question of the jurisdiction of the public service commission to make its order No. 2,002, above referred to, upon which Belcher's claim partially rests, and the question of Belcher's claim being barred by the statutes, were not necessarily involved in that case, and, therefore, all that was said by Judge Webster therein is mere dictum, expressing, as contended by counsel for the railroad company, erroneous views of the law. We cannot so view the deciding of those questions in that case. It does seem that this court could have disposed of that case by merely deciding the question discussed in the above quoted portion of the court's decision, but the other questions were manifestly questions properly to be

considered in the case and were, by counsel for the railroad company, all strenuously and elaborately argued, manifestly to the end that an end should be put to the entire controversy favorable to the railroad company and against Belcher. An elaborate and lengthy argument is made by counsel for the railroad company in his brief in an effort to convince us that the decision in that case does not, under the circumstances, become the law of this case, and that, viewed as an exposition of the law, speaking generally, the views therein expressed are erroneous, except as to the one question decided in favor of the railroad company. We deem it unnecessary to follow counsel's argument on the question of all that was decided in that case being the law of this case in the narrow, technical sense, since we are, in any event, convinced that the view of the law there expressed on all those questions is sound and should control us in reaching our conclusions in this case.

Other contentions made by counsel for the railroad company have to do with the merits of the case—that is, such contentions challenge the correctness of the commission's decision upon the merits. If the decision and order of the commission in terms awarding recovery to Belcher, as assignee of the lumber company, were a final decision, capable of being enforced as a final judgment, we would probably feel called upon to dispose of these contentions, but such is not the effect of the decision and order of the commission, nor of the judgment of the superior court affirming the decision and order, as will be readily seen by reference to the quotation of the statute embodied in the above quoted portion of our decision in *Belcher v. Tacoma Eastern R. Co.*, *supra*. That order and decision gives to Belcher no right save the right to sue in the courts to recover

upon his claim, in which suit the decision and order of the commission "shall be *prima facie* evidence of the facts therein stated." To review in the superior court or this court the decision of the commission upon the merits of Belcher's claim would be to attempt to decide the very questions which will be ultimately submitted for decision in the courts when Belcher seeks recovery therein of the award made him by the commission. We are not overlooking the decision of this court in *State ex rel. Tacoma Eastern R. Company v. Public Service Commission*, 102 Wash. 589, 173 Pac. 626, wherein it was held that proceedings of this nature before the public service commission are reviewable in the courts by reason of the broad language of § 86, Laws of 1911, p. 226; Rem. Code, § 8626-86; but we do not think that decision means that the merits of the controversy are reviewable in the courts when removed thereto by writ of review from the public service commission, as when the courts are called upon to review an order of the public service commission which becomes a final adjudication enforceable as a judgment. Of course, the jurisdiction of the public service commission, and other questions which may be decided purely as questions of law, may be reviewed in such cases. But for the courts to attempt to review the merits of the decision of the commission, we think, as already said, would be to try issues which must be ultimately tried in the action which may be brought to recover the award of the commission.

We conclude that the judgment of the superior court affirming the decision and order of the commission must be affirmed. It is so ordered.

ALL CONCUR.

[No. 15736. Department One. October 4, 1920.]

CHILD, DAY & CHURCHILL, INCORPORATED, *Appellant*, v.
F. E. R. LINFIELD *et al.*, *Respondents*.¹

PARTNERSHIP (36)—LIABILITY—SALES—DELIVERY. In an action against a partnership for goods ordered by a member of the firm, there was not sufficient evidence of delivery to the partnership to sustain its liability, where the partnership was dissolved before delivery and the goods were delivered to a corporation which succeeded to the business and receipt was taken therefor from the corporation and later a claim was filed against the corporation on its becoming insolvent.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered May 2, 1919, upon findings in favor of the defendant, dismissing an action on contract, tried to the court. *Affirmed*.

Francis A. Garrecht and *A. O. Colburn*, for appellant.

John Pattison, for respondents.

PARKER, J.—The plaintiff, Child, Day & Churchill, seeks recovery from the defendant Mrs. Linfield, as a member of the defendant partnership—she being the only one served with summons in the action—of the sum of \$245.71, the alleged purchase price of automobile tire chains claimed to have been sold and delivered by it to the defendants as partners. Trial in the superior court for Spokane county, sitting without a jury, resulted in the court finding and concluding that the chains had never been delivered to the defendant partnership, and a judgment denying recovery, from which the plaintiff has appealed to this court. The only question here to be considered is whether or not the chains were delivered to the defendant partnership.

¹Reported in 192 Pac. 922.

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On June 6, 1917, Ross, as a member of the defendant partnership, then doing business under the partnership name of "Service Garage," in a building so designated by name, gave to the appellant a written order for the purchase of a number of sets of automobile tire chains, to be delivered on November 1, 1917. On September 1, 1917, the defendant partnership dissolved and ceased to do business and sold its tools to Ross and Skinner, which we assume was a corporation, and which then commenced to do business in the same building, under the name "Ross & Skinner," not using the name "Service Garage," though it does appear that that name remained upon a sign on the building for a time after the corporation commenced to do business there. On or about November 1, 1917, appellant delivered to this building the tire chains in question, taking the receipt of Ross & Skinner therefor, that name being signed to the receipt by D. D. Skinner, who was concededly authorized to so act for Ross & Skinner. Some time later a receiver was appointed for, and took charge of the property and affairs of, Ross & Skinner, evidently because of the insolvency of that concern. Thereafter, on October 7, 1918, appellant filed its duly verified claim with the receiver for Ross & Skinner, claiming a balance of indebtedness due from that concern, which included the item for the purchase of the chains here in question, as if the chains had been sold and delivered from appellant to Ross & Skinner. Appellant's treasurer testified that its officers did not know, when the chains were delivered, that the partnership of Linfield and Ross had dissolved and ceased to do business; but it seems to us that the receipt which appellant took for the delivery of the chains constituted at least some warning to it that Linfield and Ross were no longer doing business at that place. The

record seems to warrant the conclusion, though not very certain in that regard, that appellant never sought collection of the purchase price of the chains from the partnership of Linfield and Ross for a period of more than a year following the delivery of the chains to Ross & Skinner. It is at least certain that Mrs. Linfield, from whom recovery is sought in this action, had no knowledge of the ordering of the chains by Ross, or of any claim being made by appellant against the partnership of which she was a member, for the purchase price thereof, until more than a year after the partnership of which she was a member had dissolved and had ceased to do business. We are of the opinion that, under all the circumstances of the case, the trial court did not err in holding that there was no delivery of the chains by appellant to the partnership of Linfield and Ross, either in law or fact, warranting recovery as prayed for.

The judgment is affirmed.

HOLCOMB, C. J., MAIN, MACKINTOSH, and MITCHELL, JJ., concur.

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[No. 15779. Department One. October 4, 1920.]

JOHN R. ESMOND, *Appellant*, v. E. G. RICHARDS,
Respondent.¹

SALES (95)—RIGHTS AND LIABILITIES BETWEEN PARTIES—DEFAULT IN PAYMENT—PASSING OF TITLE. Default in the payment of \$150 boot money on trading a light for a heavy team of horses, does not prevent the passing of title, where there was an exchange of possession and credit was given for the payment.

REPLEVIN (47)—VALUE OF PROPERTY—ALTERNATIVE JUDGMENT—AMOUNT. In replevin for a team of horses, defendant, who was deprived of possession by the writ, is not bound by the value alleged in the plaintiff's complaint, or limited to that sum upon a successful defense of the suit.

SAME (36)—VALUE OF USE OF PROPERTY DETAINED—MEASURE OF DAMAGES. Upon replevin for a team of horses, defendant, who was deprived of possession by the writ, is entitled to judgment for the value of the use of the team during the pendency of the action.

SAME (44)—JUDGMENT—FORM. In replevin for a team of horses, in which it was admitted that defendant was liable for a balance of \$150, a judgment for defendant for a return of the team, or in the alternative, for its value, will not be construed as denying plaintiff the right to the offset.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered September 24, 1919, upon findings in favor of the defendant, in an action in replevin, tried to the court. Affirmed.

Wm. Sheller, for appellant.

Cooley, Horan & Mulvihill, for respondent.

PARKER, J.—The plaintiff, Esmond, commenced this action in the superior court for Snohomish county, seeking recovery from the defendant, Richards, of a team of horses and a set of double harness, and damages for the alleged unlawful detention thereof by the

¹Reported in 192 Pac. 917.

defendant. A writ of replevin was issued at the instance of plaintiff, by virtue of which the defendant was deprived of the possession and use of the team and harness pending the action. Trial upon the merits before the court without a jury resulted in findings and judgment awarding to the defendant return of the possession of the team and harness, or, in the alternative, if return thereof cannot be had, recovery of the sum of \$325 from the plaintiff as the value thereof; and also the sum of \$135 damages for the withholding of the team and harness from his possession and use pending the action, together with his costs incurred in the defense of the action. From this disposition of the case by the superior court, the plaintiff has appealed to this court.

On August 4, 1919, appellant entered into a trade agreement with respondent by which he was to receive from respondent a team of light weight horses and \$150 in exchange for the heavy team and harness here in question. Possession of the respective teams and harness was accordingly surrendered by each party to the other, each being given absolute and unconditional possession of all the property coming to him under the terms of the agreement. The \$150 was not then paid to appellant by the respondent. There is conflict in the evidence as to respondent's giving appellant a check upon a bank, sufficient in form, for the \$150; but we think it is, in any event, certain that, if such a check was then given, it was then understood between the parties that respondent did not have sufficient funds in the bank on which the check was drawn to redeem it, and that it was understood that appellant should hold the check and not present it for payment for some two or three weeks until respondent received and deposited in the bank certain moneys he was to receive

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from the county for work performed by him. In this manner appellant extended credit to respondent for the payment of the \$150. Some ten days after the exchange of possession of the teams and harness, appellant claimed that the light team so traded and delivered to him by respondent was not as represented by respondent, and that he, appellant, was entitled to rescind the trade agreement and reclaim the heavy team and harness, because of fraudulent and false representations made by respondent as to the quality and character of the light team, inducing appellant to enter into the trade agreement. The trial court found "that there was no fraud and no misrepresentation on the part of the defendant (respondent) in said trade"; that the value of the team and harness in question is \$325, and that the value of its use during the time respondent was deprived of its possession and use pending the action is \$135.

The principal contention here made in appellant's behalf is that the trial court erred in finding that there was no fraud or misrepresentation on the part of respondent as to the character and quality of the light team traded by him to the appellant, and that appellant was not entitled to rescind and reclaim the heavy team and harness on that account. As we view the record, this presents only a question of fact, as to which, while the evidence is somewhat in conflict, we think it clearly preponderates in favor of the finding and conclusion made by the trial court in that behalf. We arrive at this conclusion from a thorough reading of all of the evidence in the case as furnished us in the statement of facts. We think it would serve no useful purpose to discuss the evidence in detail in this opinion.

Contention is also made in appellant's behalf that he is entitled to rescind the contract and reclaim the

heavy team and harness from respondent because the \$150 has not been paid in pursuance of the trade agreement. We are quite convinced that this contention is without merit, in view of the fact that credit was extended by appellant to respondent for the payment of the \$150. The most elementary principles of law, we think, call for the conclusion that the failure to pay the \$150, under the circumstances here shown, did not prevent title to the team and harness passing to respondent at the time of the making of the trade and the exchange of possession of the property in pursuance thereof. *Knox v. Fuller*, 23 Wash. 34, 62 Pac. 131.

Some contention is made that the court erred in finding the value of the team and harness in question to be \$325, and awarding the alternative money judgment accordingly. This seems to be rested upon the theory that, because the appellant in his complaint alleged the team to be worth \$300, the court should not have awarded respondent an alternative judgment for its value in excess of that sum; but plainly respondent was not bound by the allegations of appellant's complaint as to the value of the team. The proof is all but conclusive that it was of the value of \$325, as found by the trial court. Hence there was no error in awarding an alternative money judgment to respondent in that sum.

Contention is also made that the court erred in finding the value of the use of the team during the period respondent was deprived of its possession and use pending the action to be \$135. The evidence fully warrants the conclusion that respondent was deprived of the use of the team and harness by reason of the replevin for a period of over thirty days, and that the value of its use was \$4.50 per day. It seems quite clear, therefore, that the award of damages in this sum in favor of respondent was not erroneous.

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Syllabus.

The trial court found that respondent still owes appellant the \$150, but ignored that fact in rendering final judgment. We think the judgment should not be construed as an adjudication that appellant is no longer entitled to that sum as a charge or offset against the money award of the judgment, if it, the \$150, has in fact not been paid. So construing the judgment, we conclude that it must be affirmed. It is so ordered.

HOLCOMB, C. J., MAIN, BRIDGES, and MITCHELL, JJ., concur.

[No. 15782. Department One. October 4, 1920.]

*In the Matter of the Estate of LEOPOLD G. LAMBRECHT.*¹

TAXATION (226)—INHERITANCE TAX—DEDUCTION OF DEBTS—NECESSITY OF ADMINISTRATION. Rem. Code, § 9182, providing that the deduction of debts of the estate in computing the inheritance tax shall not be made unless the same are allowed or established within the time provided by law unless otherwise ordered by the judge of the proper county, has no application where there was no administration of the estate, administration having been dispensed with by agreement between the creditors and heirs, who paid the debts within the time prescribed by the general statute of limitations.

SAME (226)—INTEREST ON TAX—STATUTES. An inheritance tax, which is not paid within fifteen months from the date of the testator's death draws interest from that date, under Rem. Code, § 9182, providing that the inheritance tax shall draw lawful interest until paid and shall be a lien on the estate from the death of the testator, and Id., § 9192, providing that all taxes not paid within fifteen months from the death of the testator shall draw interest at the legal rate until paid.

COSTS (59, 72)—ON APPEAL—APPORTIONMENT—DISCRETION. Where an appeal from a judgment for an inheritance tax of \$9.11 was taken by the state tax commissioner for the purpose of testing the law, and was not contested and was modified only to the extent of allowing interest thereon for fifteen months, the appellant will not be allowed the costs of the appeal.

¹Reported in 192 Pac. 1018.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered November 6, 1919, upon findings in favor of the plaintiffs, in proceedings to determine the amount of an inheritance tax due from the estate of a deceased, after a hearing on the merits before the court. Modified.

J. M. Thatcher and George G. Hannan, for appellants.

PARKER, J.—The petitioners, lineal descendants and heirs of Leopold G. Lambrecht, deceased, commenced this proceeding in the superior court for Spokane county, under § 9197-1, Rem. Code, as found in the Laws of 1917, p. 596, seeking an adjudication of the amount of inheritance tax due from the estate of the deceased to the state. A hearing upon the merits in the superior court, the state tax commissioner appearing for the state and insisting that a larger amount of inheritance tax was legally due the state from the estate of the deceased than as claimed by petitioners, resulted in findings and judgment awarding to the state recovery computed upon \$911.50 as the net value of the property of the estate subject to inheritance tax, and entering judgment accordingly in favor of the state for one per cent thereof, to wit, \$9.11. From this disposition of the case, the tax commissioner has appealed to this court.

The controlling facts may be summarized as follows: Leopold G. Lambrecht died intestate in Spokane county, of which he was a resident, on June 12, 1909, leaving surviving him his wife and these petitioners, who are his lineal descendants and heirs. The whole property of deceased, at the time of his death, consisted of his one-half interest in the community property of himself and wife, situated in Spokane

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county. The larger part of this was real property, subject to mortgage indebtedness of the community. No steps have ever been taken looking to the appointment of an administrator or administration of the estate by probate proceedings in the superior court; the widow and heirs apparently being able to satisfactorily settle the estate as between themselves and the creditors of the deceased, other than as to the state as an inheritance tax creditor. It was agreed upon the hearing in this proceeding that the superior court should determine the value of the estate subject to inheritance tax, upon evidence there to be introduced, without the appointment of appraisers. Upon the evidence so introduced the court found the value of the estate and its indebtedness at the time deceased died, and computed the amount of inheritance tax due thereon to the state, as follows:

Total value of community property.....	\$25,460.00
Mortgage indebtedness	\$2,750.00
Last sickness and funeral expenses 887.00	3,637.00
<hr/>	
Net value of community property.....	\$21,823.00
Net value of estate descending to heirs	\$10,911.50
Amount of estate exempt from inheritance tax	10,000.00
<hr/>	
Amount of estate subject to tax.....	\$911.50
Amount of tax adjudged due (being 1%)..	9.11

We think that the evidence warrants the conclusion that the whole of the \$3,637 indebtedness of the estate was paid by the heirs before any of it became barred by the general statutes of limitation.

It is first contended in behalf of the tax commissioner that the heirs of the estate were not entitled to deduction of the debts from the total value of the estate

before computing the inheritance tax, because the debts were not allowed and established in the course of regular probate proceedings in the superior court. This contention is rested by the tax commissioner upon the provisions of § 9182, Rem. Code, reading as follows:

The estate "shall, for the use of the state, be subject to a tax as provided for in section 9183, after the payment of all debts owing by the decedent at the time of his death, . . . a reasonable sum for funeral expenses, . . . but said debts shall not be deducted unless the same are allowed or established within the time provided by law, unless otherwise ordered by the judge or court of the proper county, and all administrators, executors and trustees, and any such grantee under a conveyance, and any such donee under a gift, made during the grantor's or donor's life, shall be respectively liable for all such taxes to be paid by them, with lawful interest until the same shall have been paid. The inheritance tax shall be and remain a lien on such estate from the death of the decedent until paid."

It seems plain to us that the special statute of limitation relating to the presentation of claims to executors and administrators of estates in the course of administration in the superior court which was one year following the publication of notice to creditors under the old law, § 1472, Rem. Code, and six months under the new probate code, Laws of 1917, p. 673, has no application to this case; since there was never any such administration of the estate, and, as we have seen, the debts here in question were paid before the expiration of the limitation of time prescribed by the general statutes of limitation. So the question here is, Did the heirs of the deceased have a right to dispense with the formal probate administration of the estate in the superior court and settle it, as between themselves and the creditors, by agreeing among themselves and

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the creditors? We know of no law in this state that prevents the settlement of the estate of a decedent as between heirs and creditors, by common agreement between themselves, without administration of the estate by formal probate proceedings in the superior court. As to the deduction of debts from the total value of the estate for the purpose of determining the net value upon which inheritance tax shall be computed, it is true that the provisions of § 9182, Rem. Code, above quoted, do, in terms, provide that the "debts shall not be deducted unless allowed or established within the time provided by law"; which, if read entirely apart from the other provisions of the section, might seem to suggest that such debts must be established in a formal probate proceeding in the superior court; but this provision is followed by the words: "unless otherwise ordered by the judge or court of the proper county." This, we think, plainly shows that a formal administration of a decedent's estate by probate proceedings in the superior court and the establishment of claims through such proceedings is not necessary to the settlement of the inheritance tax which may be due from such estate. It is true that, at the time deceased died, there seems to have been no provision for the adjudication of the question of the inheritance tax apart from formal probate proceedings, as was later provided by § 9197-1, Rem. Code, as found in the Laws of 1917, p. 596; but it seems quite plain to us that the equity powers of the superior court were quite sufficient to give it jurisdiction to determine any controversies that might arise between the tax commissioner and the heirs of the deceased as to the amount of inheritance tax due the state, and incidental thereto, the amount of debts of the estate which the heirs may be entitled to have de-

ducted therefrom in computing the tax, in the absence of formal probate proceedings in the superior court. We are of the opinion that the superior court in this case had jurisdiction to determine the amount of indebtedness of the estate which those inheriting it were entitled to have deducted for the purpose of determining its net value upon which inheritance tax should be computed. If the debts claimed as a deduction by these petitioners as heirs of the deceased had not been paid by them within the time prescribed by the general statutes of limitation, so that the estate would have thereby been relieved from liability therefor, it may be that the heirs would not be entitled to such deductions; but that is not a question to be here considered.

It was adjudged by the superior court that the \$9.11 inheritance tax awarded the state should draw interest at the legal rate from September 12, 1910. This date, it will be noticed, was fifteen months after the death of deceased occurred. It is contended by the tax commissioner that this was error, and that interest should have been allowed upon the amount awarded from the date of the death of deceased. We have seen by the concluding language of § 9182, Rem. Code, above quoted, that the tax shall draw "lawful interest until the same shall have been paid," and that it "shall be and remain a lien on such estate from the death of decedent until paid." In § 9192, Rem. Code, we read that the tax "shall be paid within fifteen months from the death of the testator or intestate, unless a longer period is fixed by the court. All taxes not paid within the time prescribed in this section shall draw interest at the legal rate until paid." From a reading of all these statutory provisions together, we conclude that they mean that the tax shall draw interest from the date of the death of the deceased, unless paid within

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fifteen months thereafter, in which event the estate is entitled to remission of the interest. We conclude that, because of failure to pay the tax within the fifteen months following the death of the deceased, the trial court erred in fixing the time of the commencement of the drawing of interest by the tax at the end of fifteen months following the death of deceased, instead of at the time of his death. The judgment is directed to be modified by the superior court so that the \$9.11 tax adjudged to be due will draw interest from June 12, 1909, the date of the death of deceased.

In view of the fact that this proceeding is, in substance, one of an equitable nature; that the tax commissioner's award in this court is only slightly in excess of his award in the superior court; the fact that it is apparent that the case was appealed by him to this court more for the purpose of obtaining an adjudication as to the proper construction of the statute than for the recovery of the extra small amount of tax claimed by him; and the fact that the heirs have not appeared and resisted his claim in this court, he will not be awarded costs in this court.

HOLCOMB, C. J., MAIN, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15770. Department One. October 4, 1920.]

A. L. TURNER *et al.*, Respondents, v. MILDRED D. EDDY
et al., Appellants.¹

FRAUD (21, 23)—MEASURE OF DAMAGES—EVIDENCE—ADMISSIBILITY. Upon an issue as to fraud in misrepresenting the value of an apartment house sold to defendant, defendant cannot assert error in refusing to allow evidence of the market value of the house at the time of the sale, where the theory of her defense to an action for the price was an affirmance of the contract and a recoupment in damages for amounts she claimed to have expended in putting the house in as good condition as it was represented to be in.

SAME (22)—MISREPRESENTATION—EVIDENCE—SUFFICIENCY. A finding against the defense of fraud in misrepresenting the condition of an apartment house sold to the defendant, is sustained by evidence that defendant was experienced in running such houses, voluntarily sought and persisted in making the purchase after visiting the house five times and making all the inspection desired, and that a boiler, claimed by her to be defective, was inspected by her and her janitor, and she requested an inspection by city authorities, but concluded the deal without waiting therefor, and the evidence upon other points was conflicting, and she made no complaint relating to matters she learned of within a few days' time, until weeks after maturity of the note for the purchase price.

COSTS (72)—ON APPEAL—APPORTIONMENT. Where personal judgment was inadvertently entered against a defendant husband who was not liable, and the matter was not called to the trial court's attention, though defendant's counsel were in possession of a copy of the judgment for five days and were present when it was signed and did not raise the point on the motion for a new trial, upon appeal from the entire judgment, costs will not be allowed on reversing the judgment as to such defendant.

Appeal from a judgment of the superior court for King county, French, J., entered September 29, 1919, in favor of the plaintiffs, in an action on a promissory note, tried to the court. Affirmed in part and reversed in part.

¹Reported in 192 Pac. 978.

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Chadwick, McMicken, Ramsey & Rupp, S. F. Chadwick and J. E. Peterson, for appellants.

J. E. McGrew and E. E. Shields, for respondents.

MITCHELL, J.—The defendant Mildred D. Eddy purchased from the plaintiffs a leasehold interest in the Halmar Apartments, together with the furniture therein, in the city of Seattle. As part of the purchase price, she gave her promissory note in the sum of \$2,600, and secured the same by a chattel mortgage on the furniture. Some time after maturity of the note, suit was brought thereon and to foreclose the mortgage. The answer admits the note and mortgage and its nonpayment, and affirmatively seeks by way of counterclaim to recover an amount in excess of the note and mortgage on account of damages because of alleged false representations of the seller as to the condition of the property purchased. There was a judgment in favor of the plaintiffs for the full amount sued for, less the value of a small article of personal property it appears the plaintiffs overestimated the amount of. The defendants have appealed.

Four assignments of error relate to the refusal of the court to allow and consider evidence offered as to the market value of the Halmar Apartments at the time of the sale. That is, that such value, considering the condition appellant claimed at the trial it was in at the time of the sale, was considerably less than the amount she paid for it. Without any solicitation on the part of the respondent, she purchased the property, after several personal examinations and inspections of it, at a price she agreed to pay. In addition, the theory of the affirmative defense was an affirmance of the contract and a recoupment in damages or a counterclaim in certain specified amounts which, with one exception, she claimed she had been compelled to pay to

put the property in as good condition as that she alleged the respondents falsely represented it to be in. The one exception just referred to relates to an apartment consisting of rooms 30 and 31 in the basement, which she alleges were represented to be worth \$35 per month, and that, as a matter of fact, they were uninhabitable under the health ordinance of the city, whereby her counterclaim included \$1,530 for the rent of those rooms for the whole of the unexpired portion of the term of the lease. It follows that any testimony as to the market value of the property at the time of the sale was immaterial to establish the damages according to the measure thereof which she had preferred in her pleading, and hence the assignments of error upon the subject are without merit.

Other assignments refer to alleged false representations and may be considered together. The parties were strangers and the dealings between them were direct. At that time Mrs. Eddy was a widow (Mrs. Gear), having married Mr. Eddy thereafter and prior to the commencement of the action. She had recently had four or five years' experience in operating apartment houses in the cities of Oakland and San Francisco, California. For some months the respondents had been successfully conducting the Halmar Apartments. She went to the place and inquired if she could purchase the leasehold and furniture. Respondents were not inclined to sell for less than \$10,000, but she persisted until finally, about two weeks later, she purchased at the price of \$8,250. Altogether she visited the apartments five times before the sale was completed, and examined the property on several of her visits. She testified that representations were made to the effect that the plumbing, wiring and tinting were in good condition and that she relied on the representa-

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tions. The record satisfied us, as it evidently did the trial court, that she made all the personal examination she desired, and depended on that rather than upon anything respondents told her. It is perfectly clear that much that was said by respondents was nothing more than the expressions of opinions, and while it is true the appellant made some changes at considerable expense after taking possession, it was because of conditions she saw, or had full opportunity to observe, that did not suit her fancy. It is customary for people moving into a new house to do a lot of cleaning and decorating and it appears that appellant followed the rule. She testified that certain of the tenants left because the plumbing or tinting was poor in their apartments and that the rooms they occupied were not fit to live in. But those persons testified to the contrary, saying they left for other reasons. There is ample testimony that, before the sale, she was taken through the halls and a number of the apartments, the kitchen, closets and reception room, until she stated she had seen enough.

One of the principal items of the controversy was the defective condition of the boiler used in connection with the heating system. It had been inspected by the city authorities, who had issued a certificate accordingly at the last inspection tour required by ordinance. Prior to the sale, the appellant, with her prospective janitor, an experienced man, was taken to the basement to examine the boiler. There was a slight leak in it which was shown to them by the respondent, who led them to believe that was the only defect in the boiler. It appears that, on a Saturday, the appellant requested the city's inspector of boilers to examine it. Without waiting for him to do so, and without any further conversation with the respondent or examination on her part, she concluded the deal on that day. The inspector

found, on the following Monday, some other defect in the boiler, not sufficient, however, to prevent the continued use of it. She claims the other defect amounted to a fraud practiced upon her. We do not think so, for it is plain she and her janitor (who actually worked for her as such after she got possession of the premises and until the date of the trial herein) examined the boiler as much as they wished, that she called on the city's officer to make an inspection (negativizing the idea she relied on respondents' representations or opinion), and there is no testimony to show that respondents knew of the other defect complained of.

The most important item of this dispute relates to the apartment in the basement. The substance of her testimony is that she desired to examine those rooms and he refused, and that again, when she and her prospective janitor were in the basement to examine the boiler, she then desired to examine rooms 30 and 31, and that on both occasions he told her the rooms were all right, as good as any in the house, and that to disarm her he devised the cunning excuse that he did not want her to see the rooms because to do so would disturb the janitor, who might quit work. By a city ordinance, habitable rooms in apartment houses shall not be less than eight feet, four inches, in height from floor to ceiling. Rooms 30 and 31 in the Halmar Apartments are not in excess of six feet in height. Her testimony further shows that, on July 2, the district sanitary inspector served upon her a written notice not to use the basement as an apartment. The inspector testified: "The rooms in the basement did not meet the building requirements with regard to air space." That it might possibly meet the requirements with regard to construction of walls—he did not know. On the contrary, respondent's testimony is a positive denial of any refusal to let her examine the two rooms or that

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he said anything about disturbing his janitor. His janitor (Mr. Crawford) and family, consisting of wife, daughter and son-in-law, occupied the two rooms during all the time respondents had possession of the premises. On being asked what, if anything, he said prohibiting the appellant from entering those rooms, he answered: "There was nothing said. Christopher (appellant's prospective janitor) and his wife walked inside of Mr. Crawford's apartment—opened the door—Mrs. Crawford opened the door for him. Mrs. Crawford was there, but just what was said and done I don't remember." There was no categorical denial of this by either the appellant or the Christophers, all of whom were witnesses at the trial. During the occupancy of the rooms by the janitor and his family, the health officer visited the house on several occasions and never raised any objections to the basement apartment. The two rooms are situated in one corner of the concrete basement floor. There is no proof that either the respondent or Mrs. Eddy or Mr. Christopher had any actual knowledge of the requirement of the health ordinance concerning the air area of habitable rooms; nor is there any evidence that any of them, at any time during the visit and examination, took any measurement of or said anything about the height from the floor to the ceiling in the basement.

This case is one which must be determined from the weight of evidence. There are many details, of course, it would be useless to discuss. There is a sharp conflict in much of the evidence, but we are satisfied that the proof is clearly with the respondents. It is plain to be seen that the appellant was a woman of experience in the business she was undertaking; to that extent she had confidence in her own judgment, or sought the advice of others than the respondent, which of itself indicates judgment. The burden of the proof

shows the respondent did nothing to mislead her. Nor did he leave undone anything to advise her. She was taken to rooms until she said she had seen enough. A long inventory of furniture, etc., was checked from time to time, both before and on the next day after the sale, until she said she was tired of it. At the trial she claimed to have learned within a few days that many things had been misrepresented to her; and yet, by her own admission, she made no complaint whatever until weeks after the maturity of her note and about the time suit was threatened against her.

Complaint is made that the judgment erroneously runs against Mr. Eddy. It seems to have been an inadvertence on the part of the respondents in writing the judgment. Mr. Eddy and his wife were in possession of the property, which evidently was the reason for making him a party defendant. The complaint did not seek a personal judgment against him, and respondents admit in this court they are not contending for it now. It appears that counsel for appellants were present in court at the signing of the judgment, having had a copy of the proposed judgment in their possession for five days, and raised no objection to its form, and in their exceptions made no special reference to that fact. It appears the point was not called to the attention of the trial court in the motion for a new trial, which was submitted without argument. However, the judgment is erroneous and must be reversed in this respect; but, under the circumstances, respondents will recover their costs on appeal.

The judgment is reversed so far as it provides for the recovery of money against W. M. Eddy. In all other respects it is affirmed.

HOLCOMB, C. J., PARKER, MACKINTOSH, and MAIN, JJ., concur.

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[No. 15942. Department One. October 4, 1920.]

FRANK HANFORD, *Appellant*, v. KING COUNTY,
Respondent.¹

COUNTIES (88)—CLAIMS—PRESENTATION AND FILING—STATUTES—RETROACTIVE EFFECT. Since limitation laws will not be given a retroactive effect unless that legislative intent is clearly expressed, Laws of 1919, p. 414, requiring claims against a county to be filed within sixty days after the injury, will not bar claims sustained prior to the taking effect of the act, if filed within sixty days thereafter.

SAME (95)—ACTIONS—CONDITIONS PRECEDENT—PREMATURE ACTION—REJECTION OF CLAIMS. The purpose of the provision in the statute that no action shall be brought upon a claim against a county until the same has been presented and sixty days have elapsed after such presentation is to allow time for an investigation by the county, and is satisfied by a rejection of the claim, after which an action begun within the sixty-day period is not premature.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 8, 1920, on the pleadings, dismissing an action in tort. Reversed.

C. H. Hanford and *Geo. W. Korte*, for appellant.

Fred C. Brown and *Wm. Parmerlee*, for respondent.

MAIN, J.—The purpose of this action was to recover damages alleged to be due to negligence which was chargeable to the defendant county. The answer contained admissions and denials and a number of affirmative defenses. To the fifth affirmative defense, the plaintiff's demurrer was overruled. The reply did not traverse the allegations of this defense. The defendant made a motion for judgment on the pleadings, which was sustained and the action dismissed. From this disposition of the case, the plaintiff appeals.

The undisputed facts, as summarized from the pleadings, may be stated as follows: On the first day of

¹Reported in 192 Pac. 1013.

March, 1919, the appellant was injured by being struck by an automobile owned by the respondent and driven for and on its behalf. The manner of the accident is set out for the purpose of showing that the driver of the car was negligent. Paragraph 12 of the complaint alleges that, on the eleventh day of March, 1919, the appellant presented to the board of county commissioners a claim in writing for compensation in the sum of \$5,000 for the injury and damage which he had sustained. Paragraph 13 of the complaint alleges that thereafter, on the 28th day of June, the appellant, for the purpose of making a more formal presentation of his claim, filed with the clerk of the board of county commissioners an amended claim, properly verified, setting forth the particulars of the injury and the appellant's residence at the time thereof and for a period of six months preceding. On the first day of July the claim was rejected. The fifth affirmative defense alleged that the claim mentioned and set forth in paragraph 13 of the complaint was filed more than sixty days after such claim for damages accrued, and that sixty days had not elapsed after the filing and presentation of the claim before the institution of the action. The first question to be determined is whether a valid claim was presented to the board of county commissioners. Whether this question could have been raised upon the demurrer to the complaint, rather than upon the demurrer to the affirmative defense, is not now material and will not here be determined.

In 1919, the legislature passed an act relating to claims for damages against counties. Laws of 1919, ch. 149, p. 414. This act, among other things, provides:

"That all claims for damages against any county must be presented before the county commissioners of such county and filed with the clerk thereof within

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sixty days after the time when such claim for damages accrued.”

The act further provides that,

“No action shall be maintained for any claim for damages until the same has been presented to the Board of County Commissioners and sixty days have elapsed after such presentation.”

This act became effective on June 11, 1919. For the purpose of this opinion it will be assumed, but not decided, that the first claim did not comply with the prior law upon the subject because it was not verified. Giving effect to this assumption, it then appears that, when the 1919 act went into effect, the matter stood as though no claim had been filed. It presented a case where a cause of action had accrued prior to the statute becoming operative, and the question arises, to what extent, is the statute applicable to such claims. Limitation laws pertain only to the remedy and may be changed at the pleasure of the legislature, but such laws will not be given a retroactive effect unless it appears that such was clearly the legislative intention. *Moore v. Brownfield*, 7 Wash. 23, 34 Pac. 199. There is nothing in the 1919 act which would indicate a legislative intention that it should be given a retroactive effect. *Horner v. Pierce County*, 111 Wash. 386, 191 Pac. 396. Were the statute so construed, it would bar the claim upon which the present action is founded, because, under the act, all claims must be presented within sixty days after the time when such claim for damages accrue, and in this case more than sixty days had elapsed after the plaintiff's injury and before the statute became effective.

The statute not being retroactive, to what extent does it apply to causes of action which had accrued

at the time it became operative? Upon this question in *Baer v. Choir*, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286, the rule of the United States supreme court (*Sohn v. Waterson*, 17 Wall. [U. S.] 596) was adopted, which is to the effect that a new statute of limitations takes effect upon the preexisting rights of action and limits them, but in every such case the full time allowed by the new statute is available to the complainant. In other words, the limitation of the new statute, as applied to pre-existing causes of action, commences when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided. The appellant's cause of action was first subjected to the act of 1919 when that act became effective. The amended claim was filed on June 28, 1919, or within sixty days after the act became operative. The claim is not set out in the complaint, but from the allegations it would appear that it complied with the statute. Under the authorities cited, the appellant had sixty days after the statute went into effect in which to file a claim. On this branch of the case we conclude that, upon the facts as stated in the pleadings, a sufficient claim was presented.

The next question is whether the action was prematurely brought. The statute, as above pointed out, provides that no action shall be maintained upon any claim until the same has been presented to the board of county commissioners and sixty days have elapsed after such presentation. In this case the claim was presented on June 28, rejected on July 1, and the action was begun on July 3. The purpose of this provision of the statute undoubtedly was to allow the county time to investigate the particulars of the alleged accident and the extent of its liability, if any, without being harassed with the burdens of a law suit,

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and this requirement is satisfied when the county reaches and announces its conclusion, which it did in this case by rejecting the claim. In *Horwitz v. United States Fid. & Guar. Co.*, 95 Wash. 455, 164 Pac. 77, the court considered the provision of an insurance policy which provided that no suit should be brought upon the policy until three months after the particulars of the loss had been furnished the company. The particulars of the loss were furnished the company and the liability disclaimed. Within the ninety-day period mentioned in the policy, the action was begun. The same contention was there made as here, to wit, that the action was prematurely commenced. It was there held that the purpose of the provision of the policy was to allow the complainant time to investigate the loss, and such provision is satisfied as soon as the company reaches and announces its conclusion, after which suit could be brought within three months. That case is controlling, unless it is to be held that the statute is to be given a different construction from that which is given a contract between parties. The purpose of the two is the same, and it seems to us that a like holding should be made in both cases.

The judgment will be reversed, and the cause remanded with directions to the superior court to sustain the demurrer to the fifth affirmative defense.

HOLCOMB, C. J., PARKER, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15812. Department Two. October 13, 1920.]

*J. H. GWINN, as Trustee in Bankruptcy of Blewett
Harvester Company, Appellant, v. JOHN S.
HEYDON et al., Respondents.*¹

SALES (103) — WARRANTY—BREACH—EVIDENCE—SUFFICIENCY. An action on promissory notes given for the price of a new harvester to be shipped from the factory, and warranted to do good work, must fail for want of consideration and failure to deliver the machine, where it appears that the company sent from a neighbor's farm an old machine out of repair, with an expert to make it work, and who was unable to do so, and the contract was never consummated by acceptance of the order and the giving of a chattel mortgage as contemplated.

SAME (103). In such a case, the fact that the prospective purchaser paid the wages of the expert after the first few days while trying to make the harvester work satisfactorily, does not show that the machine was delivered by the company.

SAME (118)—WARRANTY—BREACH—WAIVER BY FAILING TO GIVE NOTICE. In such a case, the failure to give written notice to the company within six days as to the failure of the machine to do good work, as provided in the contract, so that an expert could be sent to remedy the defects, is not a waiver of the warranty, where the company had notice of the defects and its expert was already at work on the machine, and before the expiration of six days after the expert finished, the company brought suit on the note.

SAME (115)—WARRANTY—BREACH—OPPORTUNITY TO REMEDY DEFECTS—WAIVER OF CONDITION. In such a case, the requirement that the purchaser deliver the machine, if defective, at a certain place, is waived where the company, after notice of breach of the warranty, denied the breach and demanded payment, threatening suit to enforce the same.

Appeal from a judgment of the superior court for Adams county, Truax, J., entered October 10, 1919, in favor of the defendants, dismissing an action on promissory notes, tried to the court. Affirmed.

Adams & Miller, for appellant.

Hamblen & Gilbert, for respondents.

¹Reported in 192 Pac. 914.

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Opinion Per BRIDGES, J.

BRIDGES, J.—Appellant brought suit against respondents to recover a judgment of \$3,550, being the amount of three promissory notes given by respondents to Blewett Harvester Company. The court denied appellant any relief and ordered the notes canceled. The suit was originally begun by Blewett Harvester Company. Later it was thrown into bankruptcy and the trustee was substituted as plaintiff.

The facts are substantially as follows: In 1917, respondents were extensive wheat growers, and the harvester company wished to sell them one of its combined harvesters for \$3,550. Its representative informed respondents that it had such a machine on the farm of a neighbor some miles from respondents' place, and that such machine was practically a new one, but needed some repairs. At the request of the company, respondents, on the 9th or 10th day of August, 1917, obtained the machine from the neighboring farm and brought it to their own place. On that day, or possibly the day following, at the request of the agent of the company, respondents gave to it their written order for a new combined harvester, to be shipped to them from Pendleton, Oregon. This order was to become a contract of purchase when accepted by the company at its home office. The order further provided that, upon the arrival of the machinery, respondents should give their three promissory notes, each to be dated August 10, 1917, one falling due on the date of its execution, another in one year, and the third in two years from date, and these notes were to be secured by a chattel mortgage on the machinery ordered. The order further provided that the title should remain in the company until settlement was made, that the combined harvester was warranted to be made of good material and would do good work under favorable conditions, and

that if, on six days' trial, the machine failed to work satisfactorily, the purchaser should give written notice to the company at its home office at Pendleton, Oregon, stating in what respects the machine failed in the warranties, and that thereafter the company should have a reasonable time in which to make the machine do satisfactory work, and if it could not ultimately be made to work properly, the purchasers were to deliver it to the company at Pendleton and receive a new machine in its stead, upon like terms, or the return of any purchase price paid or notes given. The order further provided that a continued use of the machine for six days, without notice of defect, should be conclusive evidence that the warranties had been complied with; and that no warranties, representations or statements not contained in the order or contract should be binding on the company unless reduced to writing and approved by it at its head office. The order has written on it at this time an acceptance by the company, but the record fails to show when the acceptance was made, or that respondents were ever notified that the company had accepted it. The chattel mortgage provided for in the order was never given or requested to be given. Simultaneously with the giving of this order, respondents made, executed and delivered to the company their three promissory notes, which as to date and terms were as provided in the order.

It appears from the evidence that the company had previously sold this particular harvester to the neighbor from whom respondents obtained it, but he had refused to keep it because it would not do satisfactory work. It further appears that, at that time, the machine was very much out of repair. Respondents appear to have known that the machine needed some minor repairs, but were not acquainted with the fact

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that it had not given satisfactory service to the neighbor, or that it was not, generally speaking, in working condition. It was understood between the company and respondents that the company would be required to, and would, make certain necessary repairs in order to put the machine in condition for operation, and that the company would send to respondents' place an expert for this purpose. This expert arrived at once and proceeded to make the necessary adjustments and repairs. He worked in this manner for two or three days before any attempt was made to put the harvester in the field. It was then taken to the field, where the expert continued to operate it for ten or twelve days. During all of this time the machine was working very unsatisfactorily, and the expert was quite constantly aligning and adjusting it and making repairs. Meanwhile the harvester was cutting and threshing grain in an unsatisfactory manner. After operating it for some ten days or more in this manner, the expert informed respondents that he could not make the harvester do reasonably good work, and that he did not believe any one else could, and directed that it be driven to the barn and surrendered to the company. At once thereafter, respondents notified the local agent of the company that the harvester was unsatisfactory and would not comply with the warranties, and that the work had ceased and the machine was at their place, where the company could obtain it. At about the same time the expert gave verbal notice to the home office of the company of the unsatisfactory work of the harvester. Very shortly thereafter this suit was brought. There is much dispute in the testimony as to whether the machine complied with the warranties of the contract. A careful reading of the record convinces us that it did not. Our conclusion in this regard is supported by the opinion of the trial judge.

While the facts are greatly in dispute, yet a careful reading of the record convinces us that the weight of the testimony substantiates the facts as we have outlined them.

We are satisfied that there was no consideration for the notes sued on. According to the order or contract, they were not to be given until there was a delivery of the machinery; and, in our opinion, there never was any delivery thereof to respondents. All the parties knew that the harvester was out of repair, and that it would require certain expert work to put it in reasonably suitable condition. For this purpose the company sent its agent and expert to respondents' place. All the time the machine was there, this expert was working on it and trying to get it in condition for delivery; and he finally gave up the task and directed that the machine be taken to the barn and surrendered to the company. During all of this time the machine was in the possession of the harvester company through its agent and expert. The testimony clearly shows that the first note, which, according to its terms, was due on the day it was given, was not to be paid until the harvester was made to work properly. An officer of the company testified that respondents were willing to get the machine, "but wanted to get a good chance to try it out for a few days before he actually paid the note—before the note became due." Plainly, it was not in the minds of the parties that the machine was to be considered as delivered in the condition it was when the notes were given, or until it had been repaired and put in shape to do reasonably satisfactory work. This is shown by the facts: That the contract itself does not at all fit the facts of the case; that the machine was not a new one, and was not to be shipped from the factory as the contract provided; that it

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needed quite extensive repairs; that respondents brought it to their place at the special instance and request of the company's agent; that it agreed to, and did, send an expert to put the machine in order; that the company had never notified respondents that it had accepted the order and thus made it a contract, or furnished respondents with a copy thereof; and that the chattel mortgage provided for in the contract was not given or requested. All these, and other facts, show that there had been no delivery of the machine and no consideration for the notes.

Appellant argues, however, that the harvester could not have been in its possession, through its agent, because the company paid his wages for only the first two or three days that he was working with the machine and respondents paid them thereafter. This fact is, however, neither conclusive nor persuasive. The agent himself informed respondents that it was proper and customary for the purchaser to make payment to the expert or agent after the first two or three days. The conclusion to which we have thus come would require an affirmance of the judgment. But if it should be conceded that there had been a complete delivery of the harvester and that the contract had been accepted and was in force, appellant is in no position to recover on the notes. Under the contract, respondents were entitled to have a machine which was made of good material and which would "do good work when properly operated under favorable circumstances;" and we find that they did not get such a machine.

But it is earnestly argued by appellant that respondents are in no position to now claim that the harvester did not comply with the warranties, because they did not live up to that portion of the contract which pro-

vided that, "if, upon six days trial said combined harvester does not fill the above warranty, the undersigned (respondents) shall give immediate notice by registered letter to Blewett Manufacturing Company," at Pendleton, stating wherein the harvester failed to comply with the warranty, so that an expert might be sent by the company to put the machine in order, and if, finally, it could not be made to do proper work, respondents should deliver it to the company at Pendleton and receive another machine under the same terms and conditions. It is stated that respondents did not give the notice within the six days, and did not give any written notice at all to the company at Pendleton, or to any one else, and did not return the machine to the company at Pendleton; and that, under the contract, respondents could not claim that the machine was unsatisfactory, or did not comply with the warranties, until these notices had been given exactly as provided in the contract. But the time for giving the notice had not expired when the company demanded payment on the first note and threatened suit thereon, because, during all of this time, the company had its expert at work on the machine, making repairs and trying to put it in running order. The purpose of requiring the purchaser to give the notice mentioned in the contract had been fulfilled. The company knew, through its agent and expert, that the machine was not in working order. This notice provided by the contract was intended to be applicable only when the company had delivered a new machine from its factory and one which was in running order. It was not meant to apply to such facts as existed here; and, if it should be held that it was meant to apply to such facts, the company had waived the necessity for the giving of the notice by having its expert at work on the machine during the whole of the period.

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Nor were respondents, under the facts of this case, required to deliver the machine to the company at Pendleton, as, it is contended, the contract provided, because the company, after it was informed and had knowledge that the machine was not in working order and would not comply with the warranty of the contract, wrote to respondents, claiming that it did comply with the contract, demanding payment at once of the first note, and threatening suit if such payment were not made. By its conduct, the company had waived the conditions of the contract with reference to delivery of the machine at Pendleton.

We are satisfied that the judgment of the trial court was correct. It is affirmed.

HOLCOMB, C. J., FULLERTON, TOLMAN, and MOUNT, JJ., concur.

[No. 15808. Department Two. October 13, 1920.]

ELIZABETH FRANKLIN, *Appellant*, v. THE CITY OF
SEATTLE, *Respondent*.¹

MUNICIPAL CORPORATIONS (407) — GOVERNMENTAL FUNCTIONS — TORTS OF OFFICERS — HEALTH QUARANTINE — LIABILITY. A city is not liable for the fraudulent acts of its police officers and board of health in a wrongful and malicious conspiracy to charge and imprison a person as having an infectious disease, since it is but performing a governmental function in enforcing quarantine regulations in the interest of public health.

Appeal from a judgment of the superior court for King county, Frater, J., entered September 10, 1919, upon sustaining a demurrer to the complaint, dismissing an action in tort. Affirmed.

¹Reported in 192 Pac. 1015.

William F. Hays, for appellant.

Walter F. Meier and Thomas J. L. Kennedy, for respondent.

BRIDGES, J.—This was a suit for damages. A general demurrer to the complaint was sustained. Plaintiff refused to further plead and her action was dismissed. From this judgment, she has appealed.

The complaint alleged that the city of Seattle has created and maintained a "Board of Health" and a department of police; that these two departments conspired together to arrest certain persons accused by them of having some infectious or contagious disease; that it was a part of the conspiracy that, when the police had caused the arrest, the person so arrested would be placed in the city jail and there turned over to the board of health, which would make blood tests and give treatments for diseases which the person under arrest did not have, and under pretense of such treatment and the necessity therefor, would keep such person in confinement in the board of health department of the jail for long periods; that, on the 28th day of December, 1917, certain of the police officers of the city unlawfully and maliciously entered the home of the plaintiff, and, without having any warrant therefor, arrested her and forcibly took her into custody and to the city jail, and there falsely and maliciously caused her to be charged with being a "disorderly person," and set opposite her name the letters "B. T.," which letters, translated, meant "blood test;" that, as a part of the conspiracy, the health officer took charge of her and forcibly took from her arm quantities of blood for the pretended purpose of making a blood test; that thereafter the health officer maliciously and falsely charged her with having an infectious and

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contagious disease, when in fact she had no such, or other, disease, of which fact the health officer had full knowledge; and that, without authority of law, plaintiff was maliciously confined in jail with other prisoners for more than one year, all to her great humiliation, disgrace and damage.

Stripped of the usual verbiage of pleading, the charge is that the city police, unlawfully and without cause, arrested plaintiff and put her in jail, and then turned her over to the city health officer, who made a blood test and falsely found that she had a certain disease, and kept her in jail for more than a year, and that all of this was done falsely, wrongfully and maliciously. The question is, Do these facts state a cause of action against the city of Seattle? We do not think they do. The only direct connection the city had with these transactions was that it created the board of health and appointed its officers, and created the police department and made appointments thereto, and owned the jail. Every other thing was done by the health officers and the policemen. They, and they alone, were guilty, if any one was, of all the wrong, fraud, conspiracy and maliciousness charged in the complaint. Under these facts, the city was but discharging a governmental duty cast on it by the state and is not liable. The rule governing cases of this general character is tersely and clearly laid down in *McIlhenney v. Wilmington*, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470, where it is said:

“The non-liability of municipalities in such cases is based upon the ground that they are subdivisions of the state, created in part for convenience in enabling the state to enforce its laws in each locality with promptness, . . . and that while enforcing those laws which pertain to the general welfare of the state, and to the people generally in all its subdivisions, the

state acts through these subdivisions, and uses them and their officers as its agent for the purposes for which a state government is instituted and granted sovereign power for state purposes; . . .”

The same immunity applies in the case of the quarantining of persons, because the city, in that instance, is engaged in the duties of the state and acting for it. In *Lynch v. North Yakima*, 37 Wash. 657, 80 Pac. 79, 12 L. R. A. (N. S.) 261, we said:

“The handling of persons sick with contagious diseases is a duty which the city performs, through its officers and agents, in the exercise of governmental functions. The benefits of such service go to the public, and not to the municipality as a corporate body. Hence, the manner in which the officers of the city perform said services cannot, ordinarily, render the municipality liable in damages.”

See the following cases: *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847; *Howard v. Tacoma School Dist. No. 10*, 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917 D 792; *State ex rel. McBride v. Superior Court*, 103 Wash. 409, 174 Pac. 973; *Valentine v. Englewood*, 76 N. J. L. 509, 71 Atl. 344, 19 L. R. A. (N. S.) 262, and cases cited; 11 R. C. L. 812.

While the courts are not altogether in agreement as to where the line should be drawn showing when a municipality is, and when it is not, in the performance of a purely governmental duty, our attention has not been called to a single adjudicated case, where the facts were similar to those involved here, which did not hold as we here decide. We have no doubt the court was right in dismissing the case.

The judgment is affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and TOLMAN, JJ., concur.

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Syllabus.

[No. 15635. Department Two. October 13, 1920.]

THE STATE OF WASHINGTON, *Respondent*, v. DOUGLAS
M. STORRS, *Appellant*.¹

CRIMINAL LAW (221)—TRIAL—RIGHT OF DEFENDANT TO INTERVIEW WITNESS—DISCRETION OF COURT. The right of an accused person to consult with important witnesses for the state is a matter resting largely in the discretion of the trial court, and no abuse of discretion is shown from a denial thereof, where on a charge of seducing one G. it appeared that she was in love with the accused, had been acquitted of murdering accused's wife on the ground of insanity, and was greatly under the influence of the accused.

SAME (451)—APPEAL—REVIEW—HARMLESS ERROR—ARGUMENT OF COUNSEL. Error cannot be predicated upon improper remarks or arguments where the court sustains objections thereto at the time and plainly directs the jury to disregard them, unless they were of such a character that they could not be cured.

SAME (384)—APPEAL—REVIEW. The supreme court will not review alleged error in allowing an attorney to assist the prosecuting attorney, to which no objection was made or exception taken.

SAME (236-1)—APPEAL—TRIAL—OPENING STATEMENT OF COUNSEL. Prejudicial error is not shown by the prosecuting attorney's overstatement of what the state would prove, where he had not had the usual opportunity to consult with the principal witness for the state, and his opening statement was not, generally speaking, unfair.

SEDUCTION (9)—CRIMINAL RESPONSIBILITY—DEFENSES—OFFER TO MARRY—GOOD FAITH. In a prosecution for seduction under Rem. Code, § 2441, providing for a stay of proceedings upon the accused's good faith offer of marriage, it is competent for the state to show that the female seduced had been acquitted of murder on the ground of insanity and was mentally incompetent to accept a proposal of marriage.

CRIMINAL LAW (451)—APPEAL—REVIEW—HARMLESS ERROR—CONDUCT OF COUNSEL. Any prejudice from the prosecuting attorney's question to accused's counsel if he admitted certain matters, is cured where the court on objection immediately instructed the jury to disregard what had been said.

SAME (216)—TRIAL—MISCONDUCT OF JUDGE—COMMENT ON EVIDENCE. In a prosecution for seduction, where the court was called upon to rule as to the admissibility of evidence that the female

¹Reported in 192 Pac. 984; 197 Pac. 17.

seduced was willing to accept the accused's offer of marriage, she being at the time adjudged criminally insane and mentally irresponsible, a remark by the court "that under the circumstances of this case" he had not the power, and if he had would not exercise his discretion, to receive the evidence, is not an unlawful comment on the evidence.

SEDUCTION (8, 12)—PROMISE OF MARRIAGE—INSTRUCTIONS. In a prosecution for seduction by a married man, it is not error to refuse an instruction that there could be no reliance upon promises of marriage after knowledge that accused was a married man, where promise of marriage was not the basis of the charge and it was plain from the evidence that there never was any reliance on such a promise.

SAME (7, 12)—ACTS CONSTITUTING OFFENSE—PROMISES OR INDUCEMENTS—INSTRUCTIONS. In a prosecution for seduction, it is proper to refuse an instruction that consent must have been secured by reason of some false promise or deceitful inducement, where the instruction was too narrow and another instruction with proper limitations required that there be some artifice, promise, inducement or wiles inducing the consent.

SAME (9)—DEFENSES—PREVIOUS CHASTE CHARACTER—INSTRUCTIONS. In a prosecution for seduction of a woman of previous chaste character, prior acts of sexual intercourse with the accused cannot be shown to overcome the presumption of chastity.

SAME (12)—PREVIOUS CHASTE CHARACTER—PRESUMPTIONS—BURDEN OF PROOF—INSTRUCTIONS. In a prosecution for seduction, an instruction that the presumption of chastity must be overcome by proof of specific acts of prior sexual intercourse is proper, since unchastity cannot be shown by general reputation.

SEDUCTION (11)—EVIDENCE—SUFFICIENCY. A conviction of seduction is sufficiently sustained by evidence of attentions to a girl of eighteen which completely won her love before she learned that the accused was a married man and that she submitted her body to him only after they had become very intimate and had been constantly together, until she had become so madly in love with the accused as to make any sacrifice for him.

MOUNT, MACKINTOSH, MAIN, and MITCHELL, JJ., dissent.

Appeal from a judgment of the superior court for Okanogan county, Jurey, J., entered June 9, 1919, upon a trial and conviction of seduction. Affirmed.

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P. D. Smith and *W. C. Brown* (*Walter S. Fulton*, of counsel), for appellant.

W. C. Gresham and *A. R. Hilen* (*Thos. M. Askren*, of counsel), for respondent.

BRIDGES, J.—Appellant was found guilty of seducing Ruth Garrison. His motions for an instructed verdict and for new trial were denied and judgment of sentence pronounced, from which judgment he has appealed.

(1) The first assignment of error is based upon the alleged fact that the court refused to permit appellant's counsel to interview and consult with the witness Ruth Garrison before or pending the trial of the action. The record shows that, on the day the trial commenced, the appellant moved the court for permission to interview Ruth Garrison, who was one of the chief witnesses in the case, and supported that motion by affidavit to the effect that, prior to and at the time of the trial, Miss Garrison was confined in the insane ward of the state penitentiary at Walla Walla; that he had procured to be issued out of the court an order directing the warden of such penitentiary to produce her as a witness on behalf of the appellant at his trial; and that she had been brought to the place of trial by a penitentiary guard, who refused the appellant's attorneys permission to consult with her. Thereafter the court made an order denying the appellant's motion. The order of denial does not state the reasons therefor. The record further shows that Miss Garrison was a very important witness and was called by the state; that she was fully cross-examined by the attorneys for the appellant; and that, during the course of the cross-examination, but near the close thereof, they were given permission to talk privately, but in the presence of the court, with the witness.

It may be conceded that a person charged with a

crime ordinarily has a right to talk with persons having any knowledge of matters which might be beneficial or detrimental to him. But this right is not of universal application. The matter must of necessity rest largely in the discretion of the trial court; and, where that court has refused to permit the defendant to consult with a witness before the trial, this court should not reverse on that account, except for an abuse of discretion. A very thorough investigation of the question convinces us that the court did not abuse his discretion. The record shows that, before the trial, Ruth Garrison had been tried in another court for the murder of the appellant's wife; that the jury had found her not guilty because of criminal insanity and mental incompetency; that she had been sentenced to the ward for criminally insane persons at the state penitentiary, where she was confined at the time of this trial; that, for a long time before the trial of this case, she had been, and still was, greatly in love with the appellant, and he then had great influence over her; that she was willing to, and, as a matter of fact, did, during the trial, shield and protect him in all honorable ways; and that she was so enamored of him that she would have made almost any sacrifice for him. In fact, the only thing lifting this case above the usual in such cases is the great, uncommon and almost unnatural love of Ruth Garrison for the appellant, always shining through the dross. In the light of all these facts, and possibly others which the record does not disclose and which may have been known to the trial court, the latter well might have concluded that the ends of justice required the making of the order refusing the appellant and his attorneys permission to interview the witness. When we consider the manifest state of mind of the witness toward the appellant, his influence over her, her mental incapacity, and the

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fact that she was confined in the penitentiary, we cannot say that the court abused its discretion.

The appellant greatly relies upon the case of *Shaw v. State*, 79 Miss. 21, 30 South. 42, where the court held it was error to refuse the defendant the privilege of conferring with his own witness; and *State v. Papa*, 32 R. I. 453, 80 Atl. 12, where the court held that the attorney for the defendant not only had the right, but it was his duty toward the client, to fully investigate the case and to interview and examine as many as possible of the eye-witnesses to the assault, and that witnesses were not parties and should not be partisans. Those cases doubtless state the general rule; but the facts of those cases were very different from the facts of this case. It has generally been held that questions of this character are within the discretion of the trial court. It was in substance so held in the following cases: *Williams v. State*, 53 Fla. 89, 43 South. 428; *Hudson v. State*, 137 Ala. 60, 34 South. 854; *Robinson v. State*, 8 Okl. 667, 130 Pac. 121; *State v. Goodson*, 116 La. 388, 40 South. 771.

But, should it be conceded that the court abused its discretion, yet a careful reading of the testimony convinces us that the appellant was not prejudiced by the court's action. He does not point out any specific instance where he was so prejudiced. He does not point to any testimony he might have brought out if he had been given an opportunity to interview the witness. At all times she was friendly to him, and on cross-examination testified fully and openly. We cannot, therefore, find any reversible error in the action of the trial court in refusing the interview.

(2) The appellant makes numerous assignments of error based upon alleged improper remarks and improper argument to the jury by, or misconduct of, the attorneys for the state. We have uniformly held that,

where objections are made to an alleged improper remark or argument, and the court at the time sustains the objection and plainly directs the jury to disregard any such remark or argument, we will not hold such as reversible error, unless the argument or remark was of such character as to convince us that the court could not, by his admonitions to the jury, cure the error. *State v. Boyce*, 24 Wash. 514, 64 Pac. 719; *State v. Hawkins*, 27 Wash. 375, 67 Pac. 814; *State v. Wong Tung Hee*, 41 Wash. 623, 84 Pac. 596; *Bunck v. McAuley*, 84 Wash. 473, 147 Pac. 33; *State v. Ackerman*, 90 Wash. 198, 155 Pac. 743.

In common with all other courts, we have always held that we will not review an alleged error to which no objection was made or exception taken. *Rice v. Stevens*, 9 Wash. 298, 37 Pac. 440; *State ex rel. Mackintosh v. Superior Court*, 45 Wash. 248, 88 Pac. 207.

Each of the following assignments of error is controlled by the cases we have cited, to wit, assignment of error No. 2, being a remark made by the prosecuting attorney to the effect that, "I am not trying him for murder;" assignment No. 3½, concerning a remark made by the prosecuting attorney about the Mann Act; assignment No. 7, concerning another remark made by the prosecuting attorney to the effect that, "All the evidence goes to show that he played up in the mind of that little, weak girl;" assignment No. 8, with reference to certain other remarks made by the prosecuting attorney; assignment No. 10, which concerns a remark made by the prosecuting attorney as follows: "I don't think it is anything but by-play, anyway;" assignment No. 16, being a remark by the assistant prosecuting attorney to appellant's attorney as follows: "Do you mean to say that, because a man is quarreling with his own wife, it gives him a right to commit seduction outside his own family?" assignment No. 17, being a

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portion of the closing argument of the assistant prosecuting attorney. In each of these instances the appellant's attorney made objection and the objection was sustained, and the court at the time clearly and expressly warned the jury that it should not consider any such remarks or statements. While some of these remarks may have been improper, yet we have no doubt that any detrimental effect they may have had was removed by the court's instructions to the jury. The cases cited by us also dispose of assignment No. 4, where error is claimed because Mr. A. R. Hilen acted as assistant prosecuting attorney. No objection to his so acting was made at the trial, and there was no ruling of the court or request for ruling. Nor do we see any valid reason why he should not have so acted, since he did so at the request of the prosecuting attorney.

(3) A number of errors are assigned based upon the opening statement by the prosecuting attorney, wherein it is claimed he made various assertions as to what the state's testimony would show, when, as a matter of fact, the testimony failed to substantiate such statement. It must be conceded that the prosecuting attorney, in his opening statement, did claim that he would be able to prove certain things which, as a matter of fact, he failed to prove, but most of these matters were of an immaterial nature. The state was required, in the nature of things, to rely for the most part upon Ruth Garrison to make out its case; and she was, in a sense, a hostile witness—hostile in the sense that she was manifestly willing at all times to protect the appellant. It should also be borne in mind that this witness was confined to the insane ward of the state penitentiary, and that the state had not had the usual opportunity to confer with her concerning what her testimony would be. We have read and re-

read the whole of the opening statement and cannot find that the prosecuting attorney was actuated by any malice or venom, or that, generally speaking, the statement was not fair.

(4) During the trial the state offered, and the court received, in evidence a certified copy of the information charging the witness Ruth Garrison with the murder of Grace Storrs in King county, Washington, and the verdict of the jury at that trial, and also special findings of the jury and the judgment committing the witness, as a criminally insane person, to the penitentiary of the state. These papers show that the jury acquitted Miss Garrison, but found that, at the time of the commission of the crime and at the time of the trial, she was insane or mentally irresponsible. These certified copies were introduced under the following circumstances: During the course of the trial, the appellant's attorney announced in open court that the appellant was willing to, and would at once, or at any time to be fixed by the court, marry Ruth Garrison, and stated that such proposal of marriage was made in good faith. The statute with reference to seduction is as follows:

“Every person who shall seduce and have sexual intercourse with any female of previous chaste character, shall be punished by imprisonment in the state penitentiary for not more than five years or by imprisonment in the county jail for not more than one year or by a fine of not more than one thousand dollars, or by both fine and imprisonment. Provided, that if at any time before judgment upon an information or indictment, a defendant shall marry such female, the court shall order all further proceedings stayed; . . .” Rem. Code, § 2441.

The state offered these certified copies in evidence for the purpose of showing, or tending to show, that Ruth Garrison was incompetent to accept a proposal

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of marriage, that she was criminally insane and mentally irresponsible, that she was at that time confined in the penitentiary, and that the appellant's proposal of marriage was not made in good faith. We have no doubt the testimony was perfectly competent for these purposes.

(5) It is next earnestly contended that the prosecuting attorney demanded that the appellant admit certain matters involved in the trial. There is no merit in this contention. The prosecuting attorney asked the appellant's attorney the following question: "Do I understand, Mr. Smith (attorney for the appellant), that the defense admits that Plaintiff's Exhibits 14, 15, 16 and 17—" Thereupon the appellant's attorney objected to the prosecuting attorney calling upon the appellant to make an admission. The court at once allowed an exception and instructed the jury to disregard what the prosecuting attorney had said, or any request made by him. In the first place, the prosecuting attorney did not request the appellant to make any admission, and secondly, if he had made such, it was cured by the ruling of the court.

(6) After the appellant's counsel in open court expressed the willingness of the appellant to marry Ruth Garrison, he asked and received permission to make her his witness. After having so done, he asked her whether she was willing to marry the appellant. The state's attorneys objected to this question and, after argument, the court started to rule on the question of the proposed marriage, and in so doing stated that he usually preferred giving his reasons for any rulings which he might make, but that, when ruling in the presence of a jury, he always greatly limited his expressions of reasons for the ruling, lest he might say something which would cause a mistrial; and he then proceeded as follows:

“Now, whatever may be right and proper and permissible in the ordinary seduction case, I am thoroughly satisfied that by reason of the conditions and facts of this particular case that this court has no jurisdiction, power or right to allow or permit anything of the nature of the question, and if the court had the power and the right and the jurisdiction to allow or permit such, it was in the discretion of the court, and by reason of the condition and the facts of this case the court would not permit it, so the offer will be rejected and the motion denied and exception allowed.”

It is contended that the court commented on the evidence to the effect that, in his opinion, this was not an ordinary, but an aggravated, seduction case. Counsel for the appellant have extensively and seriously argued this question. We are frank to say that, in our opinion, they entirely misconstrue the expression or intention of the trial court. The court had before it, for a ruling, an offer of marriage to a woman who was at that time confined to the penitentiary, and who had been adjudged mentally incompetent. The court simply meant to say that such facts were unusual, as indeed they were. There is nothing in the court's expression to indicate that he thought that the case on trial was unusual. We cannot conceive that the jury could have misconstrued the court's meaning. Nor can it be said that the court in anywise commented upon the evidence. It was doing nothing more than giving its reasons for denying the appellant's motion to discontinue the case on the ground of his offer of marriage. The numerous cases cited by the appellant in support of his contention do not, in our opinion, lend any light to the subject.

(7) The appellant requested the court to give eight separate instructions, and assigns separate error for the refusal of the court to give any of them. His requests Nos. 3, 4, 5, 6, 7 and 8 need no special comment

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from us. They were either covered in substance by the court's instructions or were argumentative or improperly stated the law of the case. The only requested instructions we deem it necessary to particularly notice are Nos. 1 and 2. No. 1 was to the effect that, if Ruth Garrison knew, prior to the time she submitted her body to the appellant, that he was a married man, then any promises of marriage made to her by the appellant after such knowledge on her part could not have deceived her, and she would not have been justified in relying upon them. It probably would have been proper to have given this request had promise of marriage been the basis and cause of the seduction. While the testimony shows that Ruth Garrison knew the appellant was a married man at the time she submitted her body to him, and that there had been some general talk between them to the effect that he might obtain a divorce and might thereafter marry her, yet these matters were purely incidental; they were not inducing causes. Her testimony makes it perfectly plain that she did not submit to him because of any promise of marriage; and, in fact, that there never was any such promise. Under these circumstances, it was not error for the court to refuse to give the requested instruction. Appellant's request No. 2 is as follows:

"To constitute the offense of seduction under our statute, it must appear from the evidence, beyond a reasonable doubt, that Ruth Garrison yielded her person, and submitted to have sexual intercourse, by reason of some false promise or deceitful inducement held out to her by the defendant, and that by reason of such false promise or deceitful inducement she was drawn aside from the path of virtue, yielded to the defendant, and had sexual intercourse with him."

The court refused this request, and in its stead gave the following instruction to the jury:

“In order to constitute the offense (of seduction), it must be shown by the proofs in the case, beyond a reasonable doubt, that at the time alleged in the information, Ruth Garrison yielded her person and her virtue by reason of some artifice, promise, inducement, persuasion, deception or wile of said Douglas M. Storrs, made at that time or at any previous time, and without which she would not have yielded. The artifice, promise, inducement or wiles are not limited to the time the act of sexual intercourse occurred, but, if you find, from the evidence, beyond a reasonable doubt, that by persistent attention or by promises or inducements or persuasions from time to time, the said Douglas M. Storrs built up such respect and love in Ruth Garrison for himself as to finally and eventually overcome her virtue and induce her to voluntarily yield by these means, then you should find him guilty, as charged.”

The instruction requested was altogether too narrow. Under it the appellant could not be found guilty unless the jury believed he had accomplished his purpose on Ruth Garrison by reason of false promises or deceitful inducements.

To be guilty of the crime of seduction it is not necessary that the promises of the seducer should be false or that his inducements should be deceitful. Otherwise, a man who accomplishes his purpose under promise of marriage would not be guilty of seduction if his promises were made in good faith.

In the case of *State v. O'Hare*, 36 Wash. 516, 79 Pac. 39, 104 Am. St. 970, 68 L. R. A. 107, we said:

“The word ‘seduce’ in this statute is used in its ordinary legal meaning, and implies the use of arts, persuasion, or wiles to overcome the resistance of the female who is not disposed, of her own volition, to step aside from the path of virtue. No doubt the most common method of enticing an unmarried, virtuous woman from rectitude is by promises of marriage, but there are other arts, wiles, and promises which may

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be made, and which may be acted upon by a virtuous woman.”

(8) Complaint is made of the following instruction of the court:

“Insofar as the case now being tried is concerned, prior acts of sexual intercourse which the defendant himself committed with the said Ruth Garrison under the same or similar circumstances, cannot be considered by you in determining the chastity or unchastity of the said Ruth Garrison. Insofar as those acts are concerned, she would be of previously chaste character. Other acts of sexual intercourse, aside and apart from those, must be shown to overcome the presumption of chastity which the law gives to every female person.”

This instruction is in accordance with the previous rulings of this court. *State v. Sargent*, 62 Wash. 692, 114 Pac. 868, 35 L. R. A. (N. S.) 173; *State v. Tilden*, 79 Wash. 472, 140 Pac. 680.

(9) The court instructed the jury that:

“Every female person is presumed to be of chaste character, and this presumption must be accorded to Ruth Garrison in this case until such time as the defendant shall prove, by specific acts of sexual intercourse committed prior to the date alleged in the information, that the said Ruth Garrison was physically unchaste.”

Particular complaint is made of that portion of this instruction which requires the defendant to overcome the presumption of chastity by proof of “specific acts of sexual intercourse . . .” We think the instruction states the law correctly, particularly when read in connection with the other instructions covering the same subject-matter. What the court had in mind was that the appellant could not prove unchastity by proving general reputation in that regard, but he must prove to the satisfaction of the jury that Ruth Garri-

son had been guilty of the specific act of sexual intercourse. Chastity is an existing personal virtue, not a reputation. A bad reputation cannot any more make a woman unchaste than a good reputation can make her chaste. What the appellant was required to prove was actual unchastity, not reputation for unchastity. *State v. Workman*, 66 Wash. 292, 119 Pac. 751; *State v. Jones*, 80 Wash. 588, 142 Pac. 35.

Complaint is also made of other instructions of the court. We cannot here present them in detail. We have carefully considered them. We find no error in them.

(10) It is finally contended that the evidence was insufficient to prove the crime of seduction. This assignment will require us to recite the substance of the testimony. When Ruth Garrison first met the appellant, she was working in the courthouse in the city of Seattle. She was eighteen years of age and he was twenty-six. He was working in the sheriff's office in the same building. He had quite often spoken to her, and on a certain afternoon invited her to ride with him in his automobile to her home, which invitation she accepted. At that time she thought he was an unmarried man. On the same evening he called on her and took her for a ride. He called on her quite frequently during the immediately following days and weeks. During this period he did not inform her that he was married, and she continued to believe he was single. She did not learn of his marriage until some time after she had met him, and then she learned it accidentally by telephoning to his wife in an effort to talk over the telephone to him. The testimony clearly discloses that, at the time she learned he was married, she was very greatly under his influence and completely in love with him. He gave her to understand that there was very little affection between himself and his wife. He con-

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tinued to pay attentions to her, taking her to ride in his automobile, often expressing to her his admiration of and love for her, and constantly treating her as a sweetheart. At this time she was manifestly madly in love with him and would have made almost any sacrifice for him. A few weeks after their first acquaintance he took her with him to Everett, where they stopped at the same hotel during the night. At that time the appellant suggested intimate relations with her, which she refused. Thereafter he constantly called upon her and she willingly submitted to all of his embraces. At times she was required to deny him the privileges of her body. Later he went from Seattle to Okanogan city, in Okanogan county, Washington, where he worked as a mechanic. There was considerable correspondence between them. Her trust in him and her love for him at once induced her to go to him. At the hotel in Okanogan she was registered as his wife. They were very intimate and very attentive one to the other and were almost constantly together. On the first night she was in Okanogan, she again refused his solicitation that she submit her body to him; but on the second night he accomplished the act of sexual intercourse. This, in brief, is the story. We have no doubt there was ample proof to require the case to go to the jury on the question of seduction. To speak plainly, and in the substance of the language of someone else, it cannot be said that the testimony shows the act of sexual intercourse was the matching of the passions of the one against those of the other. The appellant greatly relies on the case of *Rockwell v. Day*, 101 Wash. 580, 172 Pac. 754. Whether one be guilty of seduction must depend on the facts, and the facts of that case are very different from the facts here. There the woman was forty-two years of age and had two grown daughters, and she was worldly

wise; here the girl was but eighteen. In that case there was an absence of showing of love and affection on the part of the woman, whereas here existed all the trust and love it is possible for one to possess. These are only a part of the distinctions between the two cases. The significant facts and the general atmosphere of the two cases have but little in common.

There are other assignments of error of less important nature. We have very carefully considered them, but do not find merit in them. This opinion is already too extended to discuss them in detail.

We are convinced the appellant received a fair trial and we will not disturb the judgment, which we affirm.

HOLCOMB, C. J., FULLERTON, and TOLMAN, JJ., concur.

MOUNT, J. (dissenting)—If the first nine points discussed in the majority opinion controlled the judgment in this case I might readily assent thereto. But, in my opinion, after carefully reading the evidence in the case, there is no evidence whatever of seduction. The prosecution relied wholly upon the testimony of Miss Ruth Garrison, who is alleged to have been seduced by the appellant. The evidence very clearly shows that, for some weeks, at least, prior to February of 1919, Miss Garrison and the appellant were very much in each others company. When they were together they would hug and kiss each other, and both, no doubt, were much in love. About the first of February, 1919, the appellant left Seattle, leaving behind his wife and Miss Garrison, and went to Okanogan, in Okanogan county, a place distant about 250 miles from Seattle. The appellant was employed at Okanogan as a mechanic in an automobile repair shop. After he had been there a few days he received a letter from Miss Garrison, the prosecuting witness, in which she said:

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“Listen, Lover man. You know I’m not working at the Bureau any more. I quit, and by the way, they’re some sore about it, too. I don’t want to start working again till I find out just what’s to happen about the strike. Please, Doug., won’t you let me come over there just for, say—oh—come Friday and stay until Sunday? It will be my only chance, ’cause the next job I get won’t be as easy as the court house to get away from. See? And I’d be satisfied to start in work right if I could just see you. Please, please, Douglas—I know it’s a wee bit expensive, but I worry. I want to see you. I’ll eat bread and water after I come back to make up for it. Please, please, Please!!! If they know you’re married, then I’ll pass as your sister, or anything, I don’t care what. Oh! please say yes, Doug., just this once. If you don’t get this soon enough to answer on paper, send me a wire. And Doug. I’ve sent a lot of letters to just ‘Okanogan,’ so look them up.”

Before receiving a reply to this letter, Miss Garrison sent appellant a telegram, as follows: “Am coming Saturday 8 p. m. If not O. K. wire.” This telegram was sent on Friday, and the following Saturday she arrived at Okanogan. Mr. Storrs met her at the depot and took her to the Bureau Hotel, where she was registered as Mrs. D. M. Storrs. She testified as follows:

“Q. Did you have separate rooms or otherwise from him? A. Separate. Q. How long did you maintain that separate room? A. All the week that I was there. Q. Did anything occur between you of an intimate nature at all that first night? A. Mr. Storrs was in my room. Q. What happened? A. Nothing in particular, he loved me of course. Q. Just give that a little louder. A. Mr. Storrs was in my room for a while and I went to his room and back and forth between the two rooms. Q. What was done? A. Why, he loved me. Q. Was there any act of intercourse that night? A. No. Q. What was the number of his room, if you remember? A. I don’t know for sure. I think it was 25. Q. Had you been in his room before that? A. I had. Q. Had

you ever been on his bed before that? A. Yes. Q. What time of day was it when this first act of intercourse occurred between you, do you recall? A. At night, I think. Q. Just the night time. Had you dressed or undressed in his room or your own room? A. In my own room. Q. And how were you dressed when you went to his room? A. In my kimona. Q. Did you go back to your room that night at all? A. I did not. Q. Was there more than one act of intercourse that night? A. No. Q. Now, after that, I will ask you whether or not you slept with him every night? A. I did. . . . Q. Did he ever deceive you in any way that you know of, that is, after you knew that he was married? Did he ever practice any deceit on you that you know of? A. No. Q. Did he, or did you submit to sexual intercourse with him by reason of any trick or deceit that you know of? A. No. Q. Did you and he participate in that indulgence solely for the—from the fact that you were both infatuated with each other and for your mutual enjoyment? A. Yes."

These facts are undisputed in the record.

The statute defining seduction, quoted in the majority opinion, is:

"Every person who shall seduce and have sexual intercourse with any female of previous chaste character, shall be punished by imprisonment," etc.

The word "seduce," as used in this section, has a well known meaning. In Bouvier's Law Dictionary, Rawle's Third Revision, seduction is defined as follows:

"The act or crime of persuading a female, by flattery or deception, to surrender her chastity. Webster.

"The corrupting, deceiving and drawing aside from the path of virtue which she was pursuing of a virtuous woman, by such acts and wiles, in connection with a promise of marriage, as were calculated to operate upon a virtuous woman. *State v. Eckler*, 106 Mo. 585, 17 S. W. 814, 27 Am. St. Rep. 372.

"The wrong of inducing a female to consent to unlawful intercourse, by enticements and persuasions

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overcoming her reluctance and scruples. *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397."

In *State v. O'Hare*, 36 Wash. 516, 79 Pac. 39, 104 Am. St. 970, 68 L. R. A. 107, we said:

"The word 'seduce' in this statute is used in its ordinary legal meaning, and implies the use of arts, persuasion, or wiles to overcome the resistance of the female who is not disposed, of her own volition, to step aside from the path of virtue."

The court in his instructions to the jury gave the following instruction, which the majority holds to be correct:

"In order to constitute the offense it must be shown by the proofs in the case, beyond a reasonable doubt, that at the time alleged in the information, Ruth Garrison yielded her person and her virtue by reason of some artifice, promise, inducement, persuasion, deception or wile of said Douglas M. Storrs, made at that time or at any previous time, and without which she would not have yielded. The artifice, promise, inducement or wiles are not limited to the time the act of sexual intercourse occurred, but, if you find, from the evidence, beyond a reasonable doubt, that by persistent attentions or by promise or inducements or persuasions from time to time, the said Douglas M. Storrs built up such respect and love in Ruth Garrison for himself as to finally and eventually overcome her virtue and induce her to voluntarily yield by these means, then you should find him guilty, as charged."

There is no evidence whatever in this case that the appellant at any time used any artifice, promise, inducement or persuasion, or deception, to cause Miss Garrison to yield to his request for sexual intercourse, nor that such request was made by appellant. It is true that, upon previous occasions, he had hugged her and kissed her and she had returned these demonstrations of love. When he had suggested improper relations she had repulsed his advances. There is no evi-

dence whatever that at any time he persuaded or induced her to yield to his desires by any artifice, or flattery, or deception. Without some of these elements there could have been no seduction. The evidence conclusively shows that she solicited the right to come to him from Seattle to Okanogan. Before he had time to reply to her request she sent a telegram stating that she was coming. After she arrived there she was registered as his wife. She was assigned to a separate room. According to her own testimony, she voluntarily went to his room and had sexual intercourse with him. In answer to the question, "Did you and he participate in that indulgence solely from the fact that you were both infatuated with each other and for your mutual enjoyment," she answered "Yes." It seems clear to me that there could be no seduction in a case of this kind. She voluntarily stepped aside from the path of virtue. The utmost that can be said of the evidence in this case is that the appellant was guilty of the crime of adultery, which is an independent crime and can only be prosecuted upon complaint of the husband or wife. Rem. Code, § 2457. But he was not charged with that crime, he was charged with the crime of seduction, and it was necessary to prove that the seduction was brought about by persuasion, flattery or deception. Miss Garrison denied that anything of that kind occurred. She, in substance, invited sexual intercourse when she said in her letter, above quoted, "I'll pass as your sister, or anything, I don't care what." It cannot be assumed that there was any act of sexual intercourse between these parties prior to the visit of Miss Garrison to Okanogan, because the direct and positive evidence is to the contrary. It is probably correct to say, as is said in the majority opinion, that Miss Garrison was madly in love with the appellant. She evidently loved him with her whole

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soul. She voluntarily had sexual intercourse with him to hold his love for her. She indeed went to greater length after that time. She even murdered his wife, that the wife might not be between them. She was acquitted of the charge of murder because the jury which tried her for that crime found that she was insane at the time. There was no evidence of insanity at the time of this trial. She testified as rationally and as clearly as any person could. She was the sole witness for the state upon the main points in this case. She was not disputed in any of her statements. The state, of necessity, vouched for her sanity and her truthfulness and relied upon her testimony, which, it seems to me, would convince any one that she was not seduced, but indulged in the act of sexual intercourse, as she said, for their "mutual enjoyment." In my opinion, it was the duty of the court to direct a verdict of acquittal. The judgment should therefore be reversed.

I therefore dissent from the conclusion reached by the majority.

ON REHEARING.

[*En Banc*. April 5, 1921.]

PARKER, C. J.—From a painstaking review of the record in this case, after hearing the argument of counsel for the respective parties upon a rehearing *En Banc*, we feel constrained to hold that the judgment of conviction rendered against appellant must be affirmed; as was concluded by the majority of the judges upon the first hearing of the cause in Department Two of this court.

We have taken particular pains to critically read all of the evidence as found in the statement of facts, rather than as found in abridged form in the abstract thereof prepared by counsel, with a view of determ-

ining whether or not the question of appellant's guilt should have been taken from the jury and decided by the court in his favor as a matter of law; that being the question to which the argument of his counsel was for the most part directed upon the rehearing. We think there need be but little said here in addition to what is said in the majority department opinion on that question. We note that the argument of counsel for appellant, as does our brother Mount's opinion dissenting from the conclusion of the majority department opinion, seems to proceed upon the assumption that the prosecution relied practically wholly upon the testimony of Ruth Garrison. If we could so view this record, it is possible we could come to our brother Mount's conclusion; but we cannot so view the record. The testimony of the proprietor of the hotel at Okanogan was, in substance, that appellant and Ruth Garrison lived for some time at his hotel, to all outward appearances as man and wife, both occupying the same room. Two other witnesses testified to admissions made by appellant that sexual intercourse took place between him and Ruth Garrison at that hotel at about the time charged, as will appear in testimony presently to be quoted. It therefore seems to us that there was testimony tending strongly to support the fact of sexual intercourse between them at the time charged, wholly independent of Ruth Garrison's testimony. Touching the question of appellant's efforts to have Miss Garrison submit to intercourse with him at Seattle before he went to Okanogan, we have the testimony of two witnesses—a deputy prosecuting attorney of King county and an officer of the city of Seattle—as to what appellant said to them, touching that question, in an interview they had with him about March 19th, upon his return to Seattle from Okanogan. The testimony

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of the deputy prosecuting attorney touching that interview was in part as follows:

"A. We started out by asking Storrs what he knew about the murder of his wife. He said, 'Nothing.' He said that he knew nothing. He said that he hadn't heard of her death even or how she had come to her death until he reached Wenatchee, when he read it in the paper. We asked him then when his relations had first been intimate with the Garrison girl, specifically when he had first had intercourse with her. He said that his first act of intercourse with her was in Okanogan. We said to him that he had been calling on the girl almost nightly at her apartment. He said yes, that was true. We said, 'You stayed there sometimes as late as two o'clock in the morning?' He said, 'Yes, that is true.' We said, 'You attempted repeatedly to have intercourse with her?' He said, 'Yes.' We said then, 'Don't you think it is an unreasonable sounding story that you never did succeed in having intercourse with the girl until she came to Okanogan?' He said, 'Yes, I know it doesn't sound like the truth, but it is the God's truth.' I believe those are the exact language he used in that regard. He said that he had received a letter one morning while he was here in Okanogan from her, stating that she would be here on the night train, and that there was nothing left to do but to go down to the train to meet her; that he had taken her to the Bureau Hotel and registered her as Mrs. Storrs; that she had occupied room 17, and he was living in room 25; that she occupied that room for a few days before she moved into his room, but she had stayed here about a week, a few days more or less, and then had left; that the next time he saw her, he was out at the moving picture show one evening, and after the show he went back to the hotel, and when he went to his room at the hotel he found her in bed there."

The city officer, who was then present and participated in the interview, in his testimony corroborates the above-quoted portion of the deputy prosecuting

attorney's testimony. The testimony of these two witnesses, it seems to us, lends strong support to the view that, in the accomplishment of the final act of intercourse at Okanogan, she was seduced by appellant, that is, that she did not yield to him merely because of her desire to gratify her physical sexual passions. The act punishable by our statute (Rem. Code, § 2441) is to "seduce and have sexual intercourse with" The decisions seem not to furnish any well-defined general rule as to what the word "seduction" means when used as in this statute. When we exclude the thought of a mere gratification of physical sexual passions and the selling by a woman of her body to a man, practically all other inducements which cause her to yield seem to be properly left to the jury to decide, as to their sufficiency to constitute seduction. We are impressed with the observation made by Justice Thomas, speaking for the court of appeals of Alabama, in *Smith v. State*, 13 Ala. App. 399, 69 South. 402, as follows:

"What temptation, deception, arts, or flattery may be sufficient in one case to overcome the will of the woman and cause her to surrender her virtue may not be sufficient in another case—depending, as it does, upon the relative moral and intellectual strength of the man and the woman, their respective positions in society, the vantage ground of the man, the weakness of the woman, her necessities, and a variety of conditions and circumstances peculiar to each case, which must be judged of by the jury. And therefore, when any temptation, deception, arts, or flattery at all are shown, it must be left to the jury to say whether it or they were sufficient, and whether it or they did in fact induce the intercourse, or whether the intercourse was the result of merely a desire on the part of the woman to gratify her sexual passions or deliberately to sell herself for a consideration, uninfluenced and not superinduced by the arts and wiles of the man."

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Viewing the whole history of this love affair between these two people from the time of its inception to the final consummation of their act of sexual intercourse here in question, we cannot escape the conclusion that it was for the jury, and not for the court, as a matter of law, to say whether or not Ruth Garrison yielded her body to appellant because of his persuasion, wiles and arts practiced upon her, rather than as the result of her mere desire to satisfy her physical sexual passions. The jury could well believe that it was the former and not the latter that caused her to finally yield.

We have reviewed and re-examined the questions of law incident to appellant's motion for a new trial, and have become convinced that they have all been properly disposed of by the majority opinion rendered by Department Two.

The judgment is affirmed.

FULLERTON, HOLCOMB, TOLMAN, and BRIDGES, JJ.,
concur.

MACKINTOSH, J. (dissenting)—While I believe that the dissenting opinion written by Judge Mount, upon the first hearing of this case is correct, and that the evidence in the case upon the appellant's guilt of seduction did not justify its submission to the jury, I am willing to admit that the majority of the court may be correct in arriving at the contrary conclusion, but I am satisfied, beyond any doubt, that the majority is incorrect in not, at least, granting the appellant a new trial, and for this reason:

The record shows that Ruth Garrison, then an inmate of the state penitentiary, was brought in attendance at the trial upon the application of the appellant, and was subpoenaed as his witness; that, after

her arrival in Okanogan county, the appellant and his counsel were by the court denied the right to confer with her or to have any communication with her whatever, although the prosecuting attorney and his assistants were allowed to talk with her at will. In the very nature of the case, she was the most material witness that the appellant could have, and it was of the supremest importance to him that he and his counsel should know what her testimony might be before she took the stand, especially as she had been subpoenaed in his behalf. The constitution of this state provides that every person charged with crime shall have compulsory process in obtaining witnesses in his favor, and under the laws of this state it is made obligatory upon the prosecuting attorney to indorse upon the information the names of the state's witnesses for the purpose of allowing the defendant an opportunity to investigate them and interview them before trial. If the names of the state's witnesses are not so indorsed thereon, their testimony cannot be used (except in rebuttal), and if the defendant has this right in regard to the state's witnesses, how much more should his right to interview his own witnesses be safeguarded?

I do not understand how a court can say that it is a matter lying within the discretion of the trial court to allow or disallow the defendant this right. It was a plain, arbitrary abuse of power to prevent appellant and his counsel from seeing and talking to his own witness before the trial. The fact that this witness may have been in the custody of the officers of the state is only a stronger reason for preserving the appellant's rights. This abuse of power becomes more apparent when we consider that the state's attorneys were allowed to interview this witness at will before she was

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placed on the stand. The record discloses that the witness had been adjudged insane. The record also discloses that she was in a friendly state of mind toward the appellant, yet we find her called as a witness by the state, although subpoenaed by the appellant, after the appellant had had no opportunity of eliciting from her any information in advance, and the inference must be that the interviews which the state was permitted to have with her resulted in prejudice to the appellant. It is no answer to say that cross-examination by the appellant might nullify the damage done by denying him his right, for the reason that intelligent cross-examination largely depends upon knowledge obtained beforehand. It is not always safe for the most skillful attorneys to cross-examine a witness about whom they have no previous information. As was said in the case of *State v. Papa*, 32 R. I. 453, 80 Atl. 12:

“The defendant, therefore, has the constitutional right to have compulsory process for obtaining witnesses to testify in his behalf. He has also the right, either personally or by attorney, to ascertain what their testimony will be.”

This right is so fundamental and has been so universally respected that no authority can be found which has denied it. For this reason the appellant was, at least, entitled to a new trial, and I therefore dissent.

MAIN and MITCHELL, JJ., concur.

MOUNT, J. (dissenting)—I still adhere to my dissent to the original opinion. The evidence quoted in the majority opinion above does not even tend to show seduction in Okanogan county, where the crime was alleged to have been committed. I also concur in the dissent of Judge Mackintosh.

[No. 15958. Department One. August 11, 1920.]

THE STATE OF WASHINGTON, *on the Relation of Miller Logging Company, Plaintiff*, v. THE SUPERIOR COURT FOR SNOHOMISH COUNTY, *Respondent*.¹

Certiorari to review an order of the superior court for Snohomish county, Alston, J., entered June 18, 1920, denying an order of public use and necessity in condemnation proceedings. Affirmed.

M. J. McGuinness, Kerr & McCord, and *W. P. Bell*, for relator.
L. A. Merrick, for respondent.

PER CURIAM.—The relator, Miller Logging Company, seeks by certiorari proceedings in this court a review and reversal of an order of the superior court for Snohomish county, denying an order of necessity prayed for by it in a condemnation proceeding commenced and prosecuted in the superior court for Snohomish county, in which condemnation proceeding a right of way was sought to be acquired by it for a logging road as a private way of necessity, under the provisions of Ch. 133, Laws of 1918. A review of the evidence introduced upon the trial of the issue of necessity in the superior court, and a comparison thereof with the evidence introduced upon the trial of the issue of necessity, which was under consideration by us in *State ex rel. Stephens v. Superior Court*, 111 Wash. 205, 190 Pac. 234, convinces us that the decision in that case is controlling in this case. The evidence in this case is more voluminous and it may be said that it shows the facts touching the question of necessity in greater detail than the evidence in that case; but the situation is not shown to be substantially different, and we are quite convinced that it calls for the same conclusion. That is, that there is no necessity in law for the right of way here sought, in view of the fact that relator has a fairly practical means of access to market for its logs and timber over the highway furnished by the waters of the Snohomish river.

The order of the superior court is affirmed.

¹Reported in 191 Pac. 830.

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Unlawful detainer of leased premises, see **LANDLORD AND TENANT, 2-4**.

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Foreclosure of mortgage, see **MORTGAGES, 1, 7, 8**.

For injuries from automobiles on streets, see **MUNICIPAL CORPORATIONS, 10-13**.

To abate nuisance, see **NUISANCE**.

By or against firms, see **PARTNERSHIP**.

Foreclosure of pledge, see **PLEDGES**.

Injuries from fire caused by operation of logging railroads, see **RAILROADS**.

Breach of contract in general, see **SALES**.

Price of goods sold, see **SALES, 5, 11**.

Injury to seamen, see **SEAMEN**.

Against street railroads for personal injuries, see **STREET RAILROADS**.

Reduction of assessment, see **TAXATION, 2, 7**.

Setting aside tax sale or deed, see **TAXATION, 3, 6**.

Recovery of price paid for land, see **VENDOR AND PURCHASER, 2**.

Obstruction or detention of water course, see **WATERS AND WATER COURSES, 1, 2**.

Establishment or setting aside will, see **WILLS, 1-3**.

Construction of will, see **WILLS, 4**.

Adequate Remedy at Law:

As bar to writ of prohibition, see **PROHIBITION**.

Adjoining Landowners:

Adverse possession along boundary, see **ADVERSE POSSESSION**.

Location of boundary line, see **BOUNDARIES**.

Adjudication:

Operation and effect of former adjudication, see **JUDGMENT**, 2.

Administration:

Of estate of decedent, see **EXECUTORS AND ADMINISTRATORS**.

Necessity for in computing inheritance tax, see **TAXATION**, 8

Admiralty:

Injury to seaman, see **SEAMEN**.

1. **ADMIRALTY (3, 4)—MARITIME TORTS—INJURY TO SEAMAN—JURISDICTION OF COURTS—COMMON LAW REMEDY.** A member of the crew of a motor boat injured by an explosion of gasoline negligently furnished in a kerosene can as part of the equipment of the boat, when attempting to use the contents of the can in the customary manner in starting a fire in the cook stove, may sue in the state courts for damages sustained from such injuries, and is not limited under the maritime law to a recovery of necessary expenses in his maintenance and cure, though his employment and service was maritime in its nature; since the recovery will be sustained on the theory that the injuries were received in consequence of the unseaworthiness of the ship. *Sandanger v. Carlisle Packing Co.*..... 480

Adoption:

1. **ADOPTION—INFANTS (3)—CUSTODY OF DELINQUENTS—JURISDICTION OF COURTS—STATUTES—CONSTRUCTION.** The superior court has jurisdiction to hear a petition for the adoption of a child after its permanent custody was awarded to a society by order of the juvenile court, with power to consent to adoption of the child, as provided by Rem. Code, §§ 1987-1, 1987-9, 1987-10 and 1700, notwithstanding the juvenile court act provides for the continuing jurisdiction of the court, since the juvenile court intended and had power to completely release itself of jurisdiction over the child. *McClain v. Superior Court, Chelan County*..... 260

Adverse Possession:

Lien for improvements on property adversely held, see **EJECTMENT**.

1. **ADVERSE POSSESSION (9)—HOSTILE ENTRY—ACTS OF OWNERSHIP—EVIDENCE—SUFFICIENCY.** Title by adverse possession of a disputed strip along a boundary line is not shown by evidence that parts

Adverse Possession—Continued.

have been used for a garden and for piling wood and that grass had been cut upon it, where it was not fenced. *Smith v. Chambers*. . . 600

Affidavits:

Accompanying chattel mortgage, see CHATTEL MORTGAGES, 3.

Aggravation:

Of damages, see DAMAGES, 1.

Agreement:

See CONTRACTS.

Agriculture:

Creation of pest districts as exercise of police power, see CONSTITUTIONAL LAW.

Irrigation, see WATERS AND WATER COURSES, 4-8.

1. AGRICULTURE—DESTRUCTION OF ANIMAL PESTS—ASSESSMENTS—CLASSIFICATION OF LAND—STATUTES—CONSTRUCTION. Laws of 1919, p. 425, § 7, providing for the levying of an assessment against lands benefited by the creation of a pest district and that the board of county commissioners "may classify the lands into tillable, grazing, and waste lands and fix the assessment for each class in such amount as shall seem just," etc., and that the finding by the board of special benefits shall be conclusive, will be construed as requiring classification of the lands as a prerequisite to the adoption of that method of raising the required revenue, instead of the levying of an annual tax as provided in the first paragraph of the section; the word "may," as used in the section, having a mandatory meaning and equivalent to the word "shall." *State ex rel. Stanger v. Bartlett*. 299
2. SAME. The fact that classification of the land would, in certain instances, be a physical impossibility is a question of no concern to the court, since it cannot be presumed that the legislature in providing therefor did a useless thing. *State ex rel. Stanger v. Bartlett*. 299

Aliens:

1. ALIENS (2)—TITLE TO REAL ESTATE—CITIZENSHIP—DECLARATION OF INTENTION—GOOD FAITH—EVIDENCE—SUFFICIENCY. An alien's declaration of intention to become a citizen was not filed in good faith, as required by Const., art. 2, § 33, so as to prevent the escheat of lands purchased by the alien, where the evidence shows that he claimed an alien's right to military exemption, and later, on advice of his counsel, after the state had begun an action to escheat the

Aliens—Continued.

lands held by him, he filed his declaration of intention to become a citizen. *State ex rel. Tanner v. Staehel*..... 344

2. SAME (3, 5)—TITLE TO REAL ESTATE—CONSTITUTIONAL PROVISIONS—EFFECT OF TREATIES. There is no conflict between Const., art. 2, § 33, prohibiting aliens from acquiring lands in this state by purchase, and the treaty of 1850 between the United States and Switzerland which provides that citizens shall be admitted and treated upon a footing of reciprocal equality in the two countries, where such admission and treatment shall not conflict with the constitutional or legal provisions of the contracting parties, and providing that citizens of each country shall have power to dispose of real property situated within the states of the Union or within the Cantons of the Swiss Confederation in which foreigners shall be entitled to hold real estate, or in case they acquire real property by inheritance which on account of being an alien they are not entitled to hold. *State ex rel. Tanner v. Staehel*..... 344

Alleys:

Implied easement in right to use of, see EASEMENTS.

Allowance:

Deduction of family allowance in computing inheritance tax, see TAXATION, 10.

Amendment:

Of complaint to show venue, see VENUE, 2.

Animals:

Destruction of animal pests, see AGRICULTURE.

Destruction of animal pests as exercise of police power, see CONSTITUTIONAL LAW.

Answer:

In pleading, see PLEADING.

Appeal and Error:

Costs on appeal, see COSTS, 3, 4.

Criminal appeals, see CRIMINAL LAW, 14-16.

In divorce proceedings, see DIVORCE, 6.

Assessment for public improvements, see MUNICIPAL CORPORATIONS, 7, 8.

Remedy by appeal or writ of error as barring prohibition, see PROHIBITION.

III. DECISIONS REVIEWABLE.

1. APPEAL (58, 180)—DECISIONS REVIEWABLE—FINALITY—SETTLING ACCOUNT—TIME FOR APPEAL. A decree settling the final account of

Appeal and Error—Continued.

an administrator is a final judgment, and notice of appeal given on September 30 from an order settling the account July 10, and from a supplemental decree of distribution August 26 is in time, under Laws of 1917, p. 706, § 221, allowing an appeal in probate in the manner provided by law for appeals in civil actions. *In re Babcock's Estate*..... 556

V. PRESERVATION OF GROUNDS.

2. **APPEAL (123)—PRESERVATION OF GROUNDS—ADMISSION OF EVIDENCE.** Error cannot be predicated upon sustaining an objection to a question put to party's own witness which did not indicate the evidence to be elicited, in the absence of an offer of what was expected to be proved. *Van Delinder v. Richmond*..... 191
3. **APPEAL (145)—PRESERVATION OF GROUNDS—EXCEPTIONS TO FINDINGS.** Findings made in an equity case, while not necessary, are as conclusive on appeal, when made, as in law actions, unless duly excepted to. *Pearson v. Gottstein Investment Co.*..... 60
4. **SAME (150)—EXCEPTIONS TO FINDINGS—SUFFICIENCY OF GENERAL EXCEPTION.** A general exception to the refusal of the court to make findings requested by appellant, evidenced in the record by the words "plaintiff duly excepted thereto", is insufficient to secure a review of the evidence on appeal. *Pearson v. Gottstein Investment Co.*... 60

VI. PARTIES.

5. **APPEAL (165)—NOTICE—PARTIES—SERVICE—UPON WHOM TO BE MADE.** Upon the disallowance of a claim of preference over other creditors of an insolvent corporation, creditors who appeared at the hearing and are adversely affected, are necessary parties to an appeal from the order of disallowance, necessitating the dismissal of the appeal where notice of appeal was served only upon the receiver. *Cole v. Washington Motion Picture Corp.*..... 548
6. **APPEAL (165, 218)—NECESSARY PARTIES—NOTICE.** Where various creditors appeared and filed claims in the matter of the receivership of an insolvent corporation, an appeal cannot be taken from the order on the claims by serving notice on the receiver alone, since the purpose of the statute requiring all persons appearing to be served is to prevent separate appeals. *Cole v. Washington Motion Picture Corp.*..... 548

VII. REQUISITES FOR TRANSFER OF CAUSE.

7. **APPEAL (172)—TIME FOR TAKING—PREMATURE APPEAL.** An appeal from part of a judgment is not premature because taken prior to the time the right to file a motion for new trial expired, where it

Appeal and Error—Continued.

appears that the parties moving for the new trial were not aggrieved by the part of the judgment appealed from, which was in their favor. *In re Adin's Estate*..... 93

8. SAME (174)—EFFECT OF MOTION FOR NEW TRIAL—TIME FOR TAKING. A motion for new trial is not timely made, as required by Rem. Code, § 402, where the court mailed to counsel copies of findings of fact and conclusions of law announcing his decision, together with a letter stating that the originals would be filed with the clerk on a certain date, which was done, and the motion for a new trial was not made within two days after such filing. *In re Adin's Estate*..... 93
9. SAME (218)—PARTIES ENTITLED TO NOTICE—SERVICE ON RECEIVER—SUFFICIENCY. Under Rem. Code, § 740, defining a receiver, he is but an arm of the court, and he represents creditors of the insolvent estate only to the same degree that the court represents them, and service upon him of notice of appeal by one creditor is not service upon other creditors who appeared and were adversely affected by the appeal. *Cole v. Washington Motion Picture Corp.*..... 548

IX. SUPERSEDEAS.

10. APPEAL (244)—SUPERSEDEAS—BY SUPREME COURT. Upon appeal from a judgment of the superior court, affirming an order of the state hydraulic engineer, which deprived an irrigation company of a portion of its water supply needed for irrigation, the supreme court, in the exercise of its appellate and advisory jurisdiction, will grant a supersedeas where respondents are acting officially and threatening to reduce the customary supply of water, causing irreparable damage to crops, and it did not appear that any person interested had cultivated land on the strength of the judgment appealed from. *West Side Irr. Co. v. Chase*..... 579

X. RECORD.

11. APPEAL (263, 316)—RECORD—STATEMENT OF FACTS—ALL THE EVIDENCE—CERTIFICATE AS TO ALL THE FACTS. Error cannot be assigned upon findings of fact where it appears from the record that all the facts properly considered by the court were not brought up in the statement of facts, notwithstanding the court certified the statement to contain all the material facts. *Oberleitner v. Moore*..... 592
12. APPEAL (282)—RECORD—STATEMENT OF FACTS—NECESSITY. Upon appeal from an order settling the final account of an administrator which was based on evidence introduced at the hearing, questions raised on the facts cannot be considered in the absence of a statement of facts. *In re Babcock's Estate*..... 556

Appeal and Error—Continued.

XVI. REVIEW.

- Review of decision of public service commission, see CARRIERS, 2.
13. APPEAL (388)—RIGHT TO ALLEGE ERROR—CROSS-APPEALS. The supreme court is limited to matters complained of by appellant, in the absence of a cross-appeal by respondent. *Rogers v. Savage*.. 246
 14. APPEAL (401)—REVIEW—DISCRETION—ORDER OF PROOF. Permitting improper cross-examination of a witness by defendants which in effect made him their own witness was but allowing the introduction of evidence out of its natural order and within the discretion of the trial judge, to be reviewed only for abuse of discretion. *Seal v. Long*..... 370
 15. APPEAL (406)—REVIEW—DISCRETION—NEW TRIAL. Whether the trial court does or does not express his views on the weight of the evidence upon denying a motion for a new trial will not be a distinguishing factor on appeal, but the inquiry will be limited to the question whether the verdict is supported by substantial evidence. *Ziomko v. Puget Sound Electric R.*..... 426
 16. APPEAL (413)—REVIEW—VERDICT. Findings of the jury on conflicting evidence will not be disturbed on appeal. *Seal v. Long*.. 370
 17. APPEAL (413)—REVIEW—VERDICT. Where the verdict is supported by evidence in kind or quantity such as the nature of the case requires, so that the question is one of mere preponderance of the evidence, and the trial court has refused to set the verdict aside, the supreme court will not interfere, even though it may believe that the verdict is against the weight of the evidence. *Ziomko v. Puget Sound Electric R.*..... 426
 18. APPEAL (416)—REVIEW—FINDINGS. Where a case is brought to the supreme court upon the findings alone, the respondent is entitled to the most favorable inference that can be drawn therefrom, there being a presumption of regularity and of sufficient facts to sustain the judgment. *Beebe v. Allison*..... 145
 19. APPEAL (418) — REVIEW — FINDINGS. The findings of the trial court upon conflicting evidence will not be disturbed on appeal, where the court had the witnesses before it and was in better position to weigh their testimony, and it appears that the weight of the evidence is with the respondent. *Woolfolk v. Mullins Saw Mill Co.*..... 296
 20. APPEAL (418)—REVIEW—FINDINGS. Where, upon a direct conflict of evidence, the trial court had the advantage of observing the witnesses, weight will be given to its findings, which will not be disturbed unless the evidence preponderates against them. *Snider v. Wright*..... 536

Appeal and Error—Continued.

21. **APPEAL (433)—REVIEW—HARMLESS ERROR—FAVORABLE TO APPELLANT.** Appellant cannot complain of a conflict between an instruction applying the rule of the road to a pedestrian on the left side of the road and one placing upon him the burden of proving the contributory negligence of the pedestrian, since the first instruction was erroneous and favorable to appellant. *Marton v. Pickrell*..... 117
22. **APPEAL (455)—REVIEW—HARMLESS ERROR—CONDUCT OF COUNSEL.** Error cannot be predicated upon an improper remark of counsel during examination of a witness, where the court cautioned the jury against remarks of the attorneys which were not borne out by the testimony. *Sound Timber Co. v. Danaher Lumber Co.*..... 314
23. **APPEAL (449) — REVIEW — HARMLESS ERROR.** In an action for breach of contract to deliver logs, the admission of evidence to show how much the buyer had paid on the purchase price of a mill taken from him on his default under a conditional sale contract, is harmless error, since it was a merely incidental and collateral matter and must have been so regarded by the jury. *Clements v. Cook*..... 217
24. **APPEAL (451) — REVIEW — HARMLESS ERROR — ADMISSION OF EVIDENCE.** Error in the admission of evidence as to the measure of damages is harmless in an action tried to the court, where the court did not consider it in fixing the damages. *McCarty v. California Farms Co.*..... 337
25. **APPEAL (457) — REVIEW — HARMLESS ERROR — EXCLUSION OF EVIDENCE.** In an action for breach of promise, in which plaintiff testified that the marriage was to take place after trial of a certain cause in September, it is harmless error to exclude, in denial, evidence that such cause was not then in issue, where it was not shown that plaintiff did not know the cause was not at issue. *Van Delinder v. Richmond*..... 191
26. **APPEAL (457) — REVIEW — HARMLESS ERROR — EXCLUSION OF EVIDENCE.** The rejection of evidence that would have been only cumulative and of little probative value is harmless error. *Sound Timber Co. v. Danaher Lumber Co.*..... 314
27. **APPEAL (460)—REVIEW—HARMLESS ERROR—INSTRUCTIONS—PREJUDICIAL EFFECT.** Error cannot be predicated upon instructions relating to the evidence of plaintiff's admission of fault and contributory negligence and as to plaintiff's knowledge of the law, where the evidence at most amounted to a conclusion and not a fact, and the jury could not have been misled by the reference to his knowledge of the law. *Marton v. Pickrell*..... 117
28. **APPEAL (460)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.** Error in instructing as to the duty of the city is harmless where the plain-

Appeal and Error—Continued.

tiff's contributory negligence was the approximate cause of the accident. *Thompson v. Bellingham*..... 583

29. **APPEAL (465)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.** Error cannot be predicated upon the failure to instruct as to contributory negligence where the jury found that issue in favor of the appellant. *Thompson v. Bellingham*..... 583

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

30. **APPEAL (477)—DECISION—SCOPE OF DECISION IN GENERAL.** It cannot be claimed that a decision upholding the jurisdiction of the public service commission to entertain a complaint for overcharges, and denying the defense of the statute of limitations, was the deciding of questions not involved in the case, where they were properly considered in the case and elaborately argued in the briefs manifestly to the end that an end should be put to the controversy. *State ex rel. Tacoma etc. R. Co. v. Public Service Commission*..... 629

Appliances:

Unsafe appliances, see **MASTER AND SERVANT**, 2, 3.

Application:

Of law of road, see **HIGHWAYS**, 1.

For change of venue in civil actions, see **VENUE**, 2.

Appointment:

Of executor or administrator, see **EXECUTORS AND ADMINISTRATORS**, 1, 2.

Of receiver for partnership property, see **PARTNERSHIP**, 4.

Apportionment:

Of costs on appeal, see **COSTS**, 3, 4.

Benefits of public improvements, see **MUNICIPAL CORPORATIONS**, 5, 8.

Appropriation:

Taking property for public use, see **EMINENT DOMAIN**.

Of funds for construction of state highway, see **EMINENT DOMAIN**, 4, 6.

Approval:

Of optional use of fixtures in building by architect, see **CONTRACTS**, 1, 2.

Appurtenances:

Construction of deed, see **DEEDS**.

Rights appurtenant to other estate, see **WATERS AND WATER COURSES**, 3.

Architects:

Approval or certificate of architect, arbitrators, or others of performance of contract, see **CONTRACTS**, 1, 2.

Argument of Counsel:

As harmless error, see **CRIMINAL LAW**, 16.

Assault:

Conviction in justice court on plea of guilty as former jeopardy, see **CRIMINAL LAW**, 4.

1. **ASSAULT (8)—OFFENSES—COMPLAINT—SUFFICIENCY.** A complaint in justice court charging that the defendant in a quarrel "did strike G. V. with his hand" is insufficient to sustain a conviction of assault. *State v. Collins*..... 201

Assessment:

Against land benefited by creation of pest district, see **AGRICULTURE**.

Extent of stockholder's liability on insolvency of bank, see **BANKS AND BANKING**, 2.

Of damages, see **DAMAGES**, 9.

For public improvements, see **MUNICIPAL CORPORATIONS**, 5-8.

Of tax, see **TAXATION**, 1, 2, 7.

Assignments:

Of claims pending garnishment thereon, see **GARNISHMENT**, 1.

Of mortgage or debt, see **MORTGAGES**, 3, 4.

Of contract for public improvements, see **MUNICIPAL CORPORATIONS**, 2-4.

Assumption:

Of facts in charge to jury, see **CRIMINAL LAW**, 12.

Of mortgage by purchaser of property mortgaged, see **MORTGAGES**, 3-5.

Of risk by driver of auto in city street, see **MUNICIPAL CORPORATIONS**, 17.

Attorney and Client:

Opening statement of counsel at criminal trial, see **CRIMINAL LAW**, 11.

Conduct of counsel as harmless error, see **APPEAL AND ERROR**, 22;
CRIMINAL LAW, 15, 16.

Measure of damages for breach of contingent fee contract, see **DAMAGES**, 2.

Allowance of attorney's fees, see **EXECUTORS AND ADMINISTRATORS**, 3.

1. **ATTORNEY AND CLIENT (44)—COMPENSATION—BREACH OF CONTRACT—REASONABLE VALUE OF SERVICES—EVIDENCE.** No recovery can be had by an attorney for a wrongful discharge from employment under a contingent fee contract where no evidence was offered or received to prove the reasonable value of the services rendered up to the time of the discharge; nor is a recovery sustained by proof of expenditures by the attorney during the time of his employment, the evidence only being offered to show what was done under the contract, and not as special damages. *Ramey v. Graves*..... 88

Automobiles:

- Opinion evidence as to value, see EVIDENCE, 9.
- Collision with pedestrian, see HIGHWAYS, 1, 2.
- Collision with in city street, see MUNICIPAL CORPORATIONS, 10-13.
- Implied warranty on sale by dealer, see SALES, 7, 8.
- Collision with street car, see STREET RAILROADS, 2, 5.

Bailment:

- Collateral securities, see PLEDGES.

Banks and Banking:

- Liability of stockholder of insolvent bank for interest, see INTEREST.
 - Right to foreclose pledge for amount of note due bank, see PLEDGES.
1. **BANKS AND BANKING (1) — INSOLVENCY — STOCKHOLDER'S SUPERADDED LIABILITY—SALE OR TRANSFER OF STOCK.** Under Const., art. 12, § 4, making stockholders of banks liable for debts that "accrued while they remain such stockholders", to the extent of the par value of the stock, a sale and transfer of stock in good faith prior to insolvency of the bank does not relieve the stockholder from obligations existing at the time of his ownership of the stock. *Fremont State Bank v. Vincent*..... 493
 2. **SAME (1) — EXTENT OF LIABILITY — ASSESSMENT OF STOCK.** A former owner of sixty of the five hundred shares constituting the capital stock of an insolvent bank is liable under the superadded liability imposed by Const., art. 12, § 4, equally and ratably, for 60/500 of the amount of obligations incurred while he was a stockholder of the bank. *Fremont State Bank v. Vincent*..... 493
 3. **SAME (2)—EXTENT OF LIABILITY—REISSUANCE OF CERTIFICATES OF DEPOSIT—CREATION OF NEW DEBT.** The superadded liability imposed upon stockholders by Const., art. 12, § 4, is not original but secondary, and in substance the liability of a surety, and a former owner of stock is not liable for an obligation incurred by a bank through the issuance of new certificates of deposit, after taking up and paying interest on the former certificates, long after he had ceased to be a stockholder, since the issuance of the new certificates was the creation of a new obligation. *Fremont State Bank v. Vincent*... 493
 4. **BANKS AND BANKING (31)—DRAFTS—DEPOSITS FOR COLLECTION—OWNERSHIP OF DRAFT.** It is conclusively presumed that a bank becomes the absolute owner of a draft where, without any other agreement, it is indorsed and delivered to the bank by a regular customer whose checking account is given credit for the full amount; and it is immaterial that the bank reserved the right to charge back the draft against the customer's account in case of nonpayment. *National Bank of the Republic v. Hines*..... 352

Bar:

Of action by former adjudication, see JUDGMENT, 2.

Barriers:

Liability for failure to place in street, see MUNICIPAL CORPORATIONS, 16.

Benefits:

To property from public improvement, see MUNICIPAL CORPORATIONS, 5-8.

Special assessments for benefits to property, see TAXATION, 1.

Bequests:

In general, see WILLS.

Best and Secondary Evidence:

In civil actions, see EVIDENCE, 4, 5.

Betterments:

Recovery in ejectment, see EJECTMENT.

Bill of Lading:

See CARRIERS, 5-8.

Bills and Notes:

Bills of lading, see CARRIERS, 5-8.

Defense of want of consideration, see SALES, 5.

1. **BILLS AND NOTES (140)—CHECKS—INDORSEMENT AND DELIVERY—EVIDENCE—SUFFICIENCY.** In an action on checks issued to and indorsed by defendant, in which defendant denied the indorsement and alleged that he lost the checks and immediately stopped payment, plaintiff's evidence is sufficient to make a *prima facie* case, and it is error to grant a nonsuit, where witnesses testified that defendant indorsed the checks, or similar ones, and delivered them to a third person, who gave them to plaintiff in Montana as part payment for liquor purchased, and that such third person upon his return had a dispute with defendant, who then threatened to stop payment on the checks unless he received more money. *Doonan v. Rossi*..... 150

Bona Fide Purchaser:

Rights as against holder of bills of lading, see CARRIERS, 6.

Of mortgaged property, see MORTGAGES, 3, 4.

Bonds:

Indemnity bonds, see INSURANCE.

Municipal bonds, see MUNICIPAL CORPORATIONS, 18-24.

Of irrigation districts, see WATERS AND WATER COURSES, 4-8.

Books of Account:

As evidence, see EVIDENCE, 7.

Bootlegging:

Evidence of other offenses, see CRIMINAL LAW, 7.

Cruel or unusual punishment, see CRIMINAL LAW, 17.

Prosecution of offense, see INTOXICATING LIQUORS.

Boundaries:

Disputed lines, see ADVERSE POSSESSION.

1. BOUNDARIES (13) — LOCATION OF LINES — EVIDENCE — SUFFICIENCY. Defendants' acquiescence in a boundary line along the line of an old fence a few feet from a correct survey, is sufficiently shown where it appears that such line corresponds in alignment with the boundary line between adjoining tracts; that a hedge planted by defendants to mark the boundary is in direct line therewith; that a cistern constructed on that tract by defendants would be on their neighbor's land if their present claims are correct; that a barn erected by them stands flush with such line, and is without openings on that side, though it appears to be an appropriate place for openings, and there was no offer to explain why there should be a jog in the general division line in the neighboring tracts. *Charlton v. Graham*.... 437
2. BOUNDARIES (13)—LOCATION OF LINES—EVIDENCE—SUFFICIENCY. A boundary line between two donation claims is sufficiently shown by the evidence of surveyors who made surveys and testified that it was fixed and recognized since 1874 by monuments fixed in city streets. *Smith v. Chambers*..... 600

Breach:

Of contract of employment, see ATTORNEY AND CLIENT.

Of contract for improvement, see MUNICIPAL CORPORATIONS, 2-4.

Of contract of sale, see SALES.

Of contract for sale of land, see VENDOR AND PURCHASER.

Breach of Marriage Promise:

Harmless error in exclusion of evidence, see APPEAL AND ERROR, 25.

Bridges:

Obstruction of surface waters by pier of bridge, see WATERS AND WATER COURSES, 2.

Building Contracts:

Optional use of fixtures by contractor, see CONTRACTS, 1, 2.

Burden of Proof:

To overcome presumption of chastity of female, see SEDUCTION, 6.

On contest of will, see WILLS, 3.

Carriers:

Invalidity of act fixing venue of offenses committed on railway trains, boats, etc., see **CRIMINAL LAW**, 2.

1. **CARRIERS (3-2) — OVERCHARGES — ACTION TO RECOVER — CONDITIONS PRECEDENT—STATUTES.** The public service commission has jurisdiction to consider a complaint for a refund of excess freight charges although it relates to transactions prior to the passage of the act of 1911 (Rem. Code, § 8626-91) providing that complaints for overcharges shall be filed with the commission. *State ex rel. Tacoma etc. R. Co. v. Public Service Commission*..... 629
2. **CARRIERS (3-4)—CONTRACT—OVERCHARGES—DECISION OF COMMISSION —APPEAL AND REVIEW.** A decision of the public service commission in terms ordering a recovery for overcharges on complaint filed by a shipper, pursuant to Rem. Code, § 8626-91, and a judgment on certiorari affirming the same, are not final decisions on the merits reviewable in the courts; since they but give the shipper the right to sue on the award and are merely *prima facie* evidence of the facts stated. *State ex rel. Tacoma etc. R. Co. v. Public Service Commission*..... 629
3. **CARRIERS (6)—REGULATION OF RATES—MILLING PRIVILEGES—DISCRIMINATION—REASONABLENESS — EVIDENCE — SUFFICIENCY.** The prohibition of Rem. Code, §§ 8626-20, 8626-21, is only against discrimination which is unjust or unreasonable; and it is not unjust or undue discrimination for a railroad company to grant milling-in-transit privileges to a station at the terminus of the road involving a back haul on its own line of thirty-four miles, as against another city forty-four miles beyond the terminus, which the company reached only over a leased line at a greater operating expense. *State ex rel. Great Northern R. Co. v. Public Service Commission*..... 520
4. **SAME.** Upon an issue as to the reasonableness of discrimination in allowing a back haul, a long haul may make it fair to grant the privilege which the road could not be compelled to grant on a shorter haul. *State ex rel. Great Northern R. Co. v. Public Service Commission*..... 520
5. **CARRIERS (23)—BILLS OF LADING—WRONGFUL DELIVERY OF GOODS.** Where a bank held bills of lading and the property represented thereby as collateral security for the payment of a draft purchased, a delivery of the property by a carrier without surrender of the bills of lading, and acceptance by a third person, was wrongful as against the bank, since no person other than the bank had a right to the bills of lading or the property until the amount it was entitled to receive had been paid. *National Bank of the Republic v. Hines* 352
6. **SAME (23)—WRONGFUL DELIVERY OF GOODS—BILLS OF LADING—RIGHTS OF INNOCENT PURCHASER.** In such a case, the consignee of

Carriers—Continued.

the property represented by the bills of lading, though having paid for the property, is not entitled to possession as against the bank, where the seller had possession of the property, the bills of lading were issued to him and he delivered them to the bank, the bank having no knowledge of the arrangement between the seller and the buyer. *National Bank of the Republic v. Hines*..... 352

7. SAME (26). Where property represented by a bill of lading and held by a bank as collateral security for payment of the draft and bill of lading was wrongfully converted, the measure of the bank's damages is the value of the property, up to the amount of the draft, regardless of the fact that in purchasing the draft an overdraft of the seller was paid to the bank. *National Bank of the Republic v. Hines*..... 352
8. SAME. In such case, the bank can recover the value of the property, without deduction of the freight paid to release the property, where the defendant received the amount of the freight from another when it wrongfully converted the property and sold it to defendant. *National Bank of the Republic v. Hines*..... 352

Certificate:

To statement of facts or bill of exceptions, see **APPEAL AND ERROR**, 11.

Certificates of Deposit:

Reissuance of as affecting liability of former owner of stock, see **BANKS AND BANKING**, 3.

Certiorari:

Remedy by certiorari as bar to prohibition, see **PROHIBITION**.

Challenge:

To juror, see **JURY**, 2.

Change:

In form of debt, see **MORTGAGES**, 6.

Change of Venue:

Of civil actions, see **VENUE**.

Character:

Previous chaste character of female, see **SEDUCTION**, 4, 6.

Charge:

By carrier, see **CARRIERS**, 1, 2.

To jury in criminal prosecutions, see **CRIMINAL LAW**, 12, 13.

To jury in civil actions, see **TRIAL**, 5, 8.

For loan as usury, see **USURY**.

Charter:

Violation of provision against subletting city contract, see MUNICIPAL CORPORATIONS, 1-4.

Chastity:

Presumption of, see SEDUCTION, 4, 6.

Chattel Mortgages:

1. CHATTEL MORTGAGES (3) — PROPERTY SUBJECT — CROPS ON LEASED PREMISES. A mortgagee of crops to be grown on leased premises, who had knowledge that the lessor had served notice terminating the lease for that year, can claim no greater right to the crops than the lessee, since he was not an innocent mortgagee. *Hinkhouse v. Wacker*..... 253
2. CHATTEL MORTGAGES (13) — PROPERTY INCLUDED — DESCRIPTION IN MORTGAGE. A chattel mortgage describing the property as all furniture and fixtures contained in a certain building, etc., and all merchandise contained therein "and more especially described as follows," and given to secure the full purchase price on the sale of a pool hall and cigar store, will be held to meet the intent of the parties as including all property in the building, which included property used in the business in addition to that specifically described in the mortgage. *Mott v. Johnson*..... 18
3. CHATTEL MORTGAGES (18, 24) — VALIDITY — AFFIDAVIT AND RECORDING — EFFECT OF REACKNOWLEDGMENT. A chattel mortgage which was not filed within ten days from the time of execution, though duly acknowledged and accompanied by the affidavit of the mortgagor, is not validated by a reacknowledgment and a redating and filing, without a resigning or the making of an affidavit of good faith by the mortgagor, since the statute, Rem. Code, §§ 3660, 3661, requires a strict compliance with all essential requirements, without which the mortgage can have no validity as against creditors. *Robinson, Thieme & Morris v. Whittier*..... 6
4. SAME (46) — AFFIDAVIT AND RECORDING — VALIDITY — EFFECT OF POSSESSION BY MORTGAGEE. In such a case, it cannot be claimed that the taking possession of the property by the mortgagee before the rights of creditors accrued would validate the mortgage, the evidence merely showing that certain chattels were removed by an agent of the mortgagee at the direction of the mortgagor and were wrongfully taken to a place other than that intended, but not under the care of the mortgagee, and that he knew nothing of the removal of the goods and never had possession. *Robinson, Thieme & Morris v. Whittier*..... 6

Chattels:

Substantial performance of contract for manufacture of, see CONTRACTS, 3, 4.

Checks:

Indorsement and delivery, see **BILLS AND NOTES**.

Child:

See **GUARDIAN AND WARD**.

Adoption of, see **ADOPTION**.

Custody and support on divorce of parents, see **DIVORCE**.

Cities:

See **MUNICIPAL CORPORATIONS**.

Citizens:

Declaration of intention by alien, see **ALIENS**, 1.

Claim and Delivery:

See **REPLEVIN**.

Claims:

Against county, see **COUNTIES**, 2, 3.

Assignment of pending garnishment, see **GARNISHMENT**, 1.

Collateral Security:

See **PLEDGES**.

Collection:

Deposits for collection, title to, see **BANKS AND BANKING**, 4.

Collision:

With automobile, see **HIGHWAYS**, 1, 2.

Between vehicles or with persons using streets, see **MUNICIPAL CORPORATIONS**, 10-13.

Between street cars or with vehicles, see **STREET RAILROADS**.

Comment:

On evidence, see **CRIMINAL LAW**, 9.

Commerce:

Carriage of goods and passengers, see **CARRIERS**.

Commissioners:

Issuance of license by county board to operate ferries, see **FERRIES**.

To make assessment for public improvements, see **MUNICIPAL CORPORATIONS**, 5-8.

Community Property:

See **HUSBAND AND WIFE**.

Compensation:

Of attorney, see **ATTORNEY AND CLIENT**.

For performance of contract, see **CONTRACTS**, 1, 2.

Compensation—Continued.

Pecuniary compensation for injuries caused by unlawful acts of another, see DAMAGES.

For property taken for public use, see EMINENT DOMAIN, 5.

For use of money, see INTEREST.

Complaint:

In criminal action, see ASSAULT.

Compromise and Settlement:

Relinquishment of right or claim by release thereof, see RELEASE.

1. COMPROMISE AND SETTLEMENT (9)—EVIDENCE—SUFFICIENCY. A final settlement and adjustment of all matters relating to certain trades in real estate is sufficiently shown by evidence that plaintiff was paid sums for his services in making the trades and for expenses incurred in farming the land before the first trade, and that thereafter in an action against the defendant brought by a third party claiming a large sum due him in the transaction, the plaintiff positively testified that the sums paid him were given in full and final settlement of all that was due, although now testifying that part of the sums paid was an advance merely, and that there was a mutual mistake in failing to consider certain payments and personal property involved in the transaction. *Schrock v. Schrock*..... 22

Computation:

Of limit of municipal indebtedness, see MUNICIPAL CORPORATIONS, 18-20.

Of inheritance tax, see TAXATION, 8-11.

Conclusion:

Of witness, see EVIDENCE, 9.

In pleading, see PLEADING, 1.

Condemnation:

Taking property for public use, see EMINENT DOMAIN.

Condition:

Precedent to action to recover overcharge, see CARRIERS, 1.

Precedent to action against county, see COUNTIES, 2, 3.

Precedent to condemnation proceedings, see EMINENT DOMAIN, 6.

Conduct:

Of juror or jury as ground for new trial, see TRIAL, 9, 10.

Confirmation:

Of sale of real estate by guardian, see GUARDIAN AND WARD, 2.

Consent:

Of female induced by promise or artifice, see SEDUCTION, 1.

Consideration:

- Want or failure of, as defense, see MORTGAGES, 7.
- Want of, as defense to action on note, see SALES, 5.
- Of contract to sell land, see VENDOR AND PURCHASER, 2.

Constitutional Law:

- Prohibition against ownership of land by aliens, see ALIENS, 2.
- Right to trial by jury of vicinage, see CRIMINAL LAW, 1, 2.
- Cruel and unusual punishment, see CRIMINAL LAW, 17.
- Condemnation of property in other state for purpose of city water supply, see EMINENT DOMAIN, 1, 2.
- Validity of act defining and punishing bootlegging, see INTOXICATING LIQUORS, 1.
- Limitation on power of municipality to incur indebtedness, see MUNICIPAL CORPORATIONS, 18-20.
- Equality and uniformity in taxation, see TAXATION, 1.

1. CONSTITUTIONAL LAW (43)—POLICE POWER—DESTRUCTION OF ANIMAL PESTS. Laws of 1919, p. 425, § 1, providing for the creation of pest districts by the board of county commissioners on petition of taxpayers of the county, for the purpose of exterminating animals destroying crops, is constitutional as being within the police power of the state. *State ex rel. Stanger v. Bartlett*..... 299

Construction:

- Of statutes providing for assessment of lands benefited by creation of pest district, see AGRICULTURE.
- Of deed, see DEEDS.
- Of contract for sale of land, see VENDOR AND PURCHASER, 1.
- Of will as to payment of debts, see WILLS, 4.

Contempt:

- Review of conviction by habeas corpus, see HABEAS CORPUS, 2.
- Sentence and commitment for violation of injunction, see INJUNCTION.
- Bias of judge as authorizing change of venue, see VENUE, 1.

1. CONTEMPT (28)—CRIMINAL OR CIVIL PROCEEDING. A commitment for violating an injunction negatives the idea that it was "to enforce a remedy of a party" within the meaning of Rem. Code, § 1075, subd. 2, and is a criminal, rather than a civil proceeding, where the injunction was issued at the instance of the prosecuting attorney for the preservation of order and the protection of the public in general. *In re Parent*..... 620

Contest:

- Of will, see WILLS, 3.

Contingent Fees:

See ATTORNEY AND CLIENT.

Contractors:

On public work, see MUNICIPAL CORPORATIONS, 2-4.

Contracts:

Novation agreements, see ACCOUNT, ACTION ON.

Contingent fee contracts, see ATTORNEY AND CLIENT.

Bills of lading, see CARRIERS, 5-8.

Compromise, see COMPROMISE AND SETTLEMENT.

Measure of damages for breach, see DAMAGES, 2, 3.

Admission of parol or extrinsic evidence, see EVIDENCE, 8.

Agreements within statute of frauds, see FRAUDS, STATUTE OF.

Of insurance in general, see INSURANCE.

For public improvements, see MUNICIPAL CORPORATIONS, 2-4.

Novation, see NOVATION.

Creation of relation, see PARTNERSHIP, 1.

Release of rights, see RELEASE.

Sales of personalty, see SALES.

Subrogation to rights or remedies of creditors, see SUBROGATION.

For services to be rendered by lender, see USURY.

Sale of land, see VENDOR AND PURCHASER.

1. CONTRACTS (141) — BUILDING CONTRACTS — OPTIONAL USE OF FIXTURES—WITHHOLDING APPROVAL BY ARCHITECT—EXTRA COST. The extra cost of installing fixtures specified in a building contract may be recovered, where the contract allowed the contractors to install other fixtures of equal make and made the architects arbitrators, and officers in charge of the building refused to allow the change or permit the architects to approve thereof, which they would have done if allowed to exercise their independent judgment. *King v. State*..... 274
2. SAME (141). In such a case, the contractor's right of recovery is not affected by a provision of the contract to the effect that no deviation from the drawings or specifications should be made without the written consent or approval of the officers in charge of the building, since there was no deviation attempted, but only the authorized substitution of one make of goods for another. *King v. State* 274
3. CONTRACTS (144)—SUBSTANTIAL PERFORMANCE—MANUFACTURE OF CHATTELS FOR SPECIAL USE. The doctrine of substantial performance applies to contracts for the manufacture of chattels according to plans and specifications, for a special use. *Harrild v. Spokane School District* 266
4. SAME (144)—SUBSTANTIAL PERFORMANCE—INSTRUCTIONS. In an action for the price of school desks manufactured according to

Contracts—Continued.

plans and specifications in which the court instructed that plaintiff could recover if he had tried to follow the plans and specifications and the desks delivered were substantially as required by the contract, it is not error to refuse a requested instruction that the plans and specifications were a part of the contract and that plaintiff must show by a preponderance of the evidence that he complied strictly with the contract. *Harrild v. Spokane School District* 266

Contribution:

From surviving guarantor, see SUBROGATION.

Contributory Negligence:

Harmless error in instructions as to, see APPEAL AND ERROR, 27, 29.

Of person injured on highway, see HIGHWAYS, 2, 4.

Of person injured by collision in street, see MUNICIPAL CORPORATIONS, 11.

As question for jury, see STREET RAILROADS, 2, 4.

Conversations:

Evidence of to impeach witness, see WITNESSES, 2, 3.

Conveyances:

See EASEMENTS.

Of personalty as security for debt, see CHATTEL MORTGAGES.

In general, see DEEDS.

As security for debt, see MORTGAGES.

Mortgaged property, see MORTGAGES, 3, 4.

Water rights, see WATERS AND WATER COURSES, 3.

Corporations:

See MUNICIPAL CORPORATIONS.

Parties entitled to notice of appeal in receivership proceedings, see APPEAL AND ERROR, 5, 6.

Stockholders of banks, see BANKS AND BANKING.

Liability of stockholder of insolvent bank for interest, see INTEREST.

Subrogation of co-guarantor to rights of judgment creditors, see SUBROGATION.

Correction:

Of assessment of taxes, see TAXATION, 2.

Costs:

In garnishment proceedings, see GARNISHMENT, 2.

Estimate of cost of irrigation project, see WATERS AND WATER COURSES, 4.

1. COSTS (8)—PREVAILING PARTY. Where, upon breach of a lease

Costs—Continued.

- contract, the amount of damages allowed to the defendant was in excess of those found against him, it carried the costs in his favor. *Snider v. Wright*..... 536
2. **COSTS (50)—TAXATION—SERVICE AND FILING.** The filing of a cost bill after announcement of the decision but before the entry of judgment instead of ten days thereafter, is not prejudicial or ground for striking the cost bill. *Snider v. Wright*..... 536
3. **COSTS (59, 72)—ON APPEAL—APPORTIONMENT—DISCRETION.** Where an appeal from a judgment for an inheritance tax of \$9.11 was taken by the state tax commissioner for the purpose of testing the law, and was not contested and was modified only to the extent of allowing interest thereon for fifteen months, the appellant will not be allowed the costs of the appeal. *In re Lambrecht's Estate*..... 645
4. **COSTS (72)—ON APPEAL—APPORTIONMENT.** Where personal judgment was inadvertently entered against a defendant husband who was not liable, and the matter was not called to the trial court's attention, though defendant's counsel were in possession of a copy of the judgment for five days and were present when it was signed and did not raise the point on the motion for a new trial, upon appeal from the entire judgment, costs will not be allowed on reversing the judgment as to such defendant. *Turner v. Eddy* 652

Counties:

- Creation of pest districts, see **AGRICULTURE**.
- Creation of pest districts as exercise of police power, see **CONSTITUTIONAL LAW**.
- Right to trial by jury of vicinage, see **CRIMINAL LAW**, 1, 2.
- Issuance of license for operation of ferry, see **FERRIES**.
- Liability for defects in highway, see **HIGHWAYS**, 3, 4.
- Correction of excessive tax, see **TAXATION**, 2.
- Irrigation districts, see **WATERS AND WATER COURSES**, 4-8.

1. **COUNTIES (59)—REPRESENTATION—TORTS OF OFFICERS OR AGENTS—SCHOOL SUPERINTENDENT AS AGENT—LIABILITY.** A county is not liable under the doctrine of *respondet superior* for the torts or negligence of the county superintendent, as the relation of principal and agent does not exist, since the officer is elected by the people, his duties prescribed by statute, and not subject to the control of the county in the execution of its governmental powers. *Smith v. Seattle School District No. 1*..... 64
2. **COUNTIES (88)—CLAIMS—PRESENTATION AND FILING—STATUTES—RETROACTIVE EFFECT.** Since limitation laws will not be given a retroactive effect unless that legislative intent is clearly expressed, **Laws**

Costs—Continued.

of 1919, p. 414, requiring claims against a county to be filed within sixty days after the injury, will not bar claims sustained prior to the taking effect of the act, if filed within sixty days thereafter. *Hanford v. King County*..... 659

3. SAME (95)—ACTIONS—CONDITIONS PRECEDENT—PREMATURE ACTION—REJECTION OF CLAIMS. The purpose of the provision in the statute that no action shall be brought upon a claim against a county until the same has been presented and sixty days have elapsed after such presentation is to allow time for an investigation by the county, and is satisfied by a rejection of the claim, after which an action begun within the sixty-day period is not premature. *Hanford v. King County* 659

County Board:

Issuance of licenses to operate ferries, see FERRIES.

County Roads:

See HIGHWAYS.

Courts:

Jurisdiction over maritime torts, see ADMIRALTY.
 Adoption proceedings, see ADOPTION.
 Review of decisions, see APPEAL AND ERROR.
 Supersedeas by supreme court, see APPEAL AND ERROR, 10.
 Contempt of court, see CONTEMPT.
 Venue of criminal offenses, see CRIMINAL LAW, 1, 2.
 Conviction in justice court as former jeopardy, see CRIMINAL LAW, 4.
 Jurisdiction and proceedings in suits for divorce, see DIVORCE.
 Judicial notice, see EVIDENCE, 1.
 Appointment of administrator, see EXECUTORS AND ADMINISTRATORS, 1, 2.
 Habeas corpus proceedings, see HABEAS CORPUS.
 Jurisdiction to punish for violation of injunction, see INJUNCTION.
 Conclusiveness of judgments, see JUDGMENT, 2.
 Right to trial by jury, see JURY, 1.
 Review of assessment for improvement, see MUNICIPAL CORPORATIONS, 7, 8.
 Rulings on motions for new trial, see NEW TRIAL.
 Prohibiting judicial proceedings, see PROHIBITION.
 Jurisdiction of action for injury to seaman, see SEAMEN.
 Change of venue, see VENUE.

Creditors:

Subrogation to rights of creditor, see SUBROGATION.

Criminal Law:

See HOMICIDE; SEDUCTION.

Sufficiency of complaint charging assault, see ASSAULT.

Contempt as criminal offense, see CONTEMPT.

Habeas corpus to compel release of defendant, see HABEAS CORPUS, 2.

Contempt of court in violating injunction, see INJUNCTION.

Violation of liquor laws, see INTOXICATING LIQUORS.

Violation of municipal ordinances, see MUNICIPAL CORPORATIONS, 9.

Trial of civil actions, see TRIAL.

1. CRIMINAL LAW (29-2)—VENUE—CONSTITUTIONAL PROVISIONS—RIGHT TO TRIAL BY JURY OF VICINAGE. Under Const., art. 1, § 22, granting to accused persons the right to a speedy, public trial by an impartial jury of the county in which the offense is alleged to have been committed, one accused of crime has a right to be tried in the county in which the offense is alleged to have been committed. *State v. Reese*..... 507
2. SAME. Rem. & Bal. Code, § 2293, making the route traversed by a railway car, train or other public conveyance, and the water traversed by any boat, criminal districts, and providing that the jurisdiction of offenses committed on any such railway car, train or boat, or at any station or depot upon such route, shall be in any county through which such car, train or boat may pass during the trip or voyage, or in which the trip or voyage may begin or terminate, is void as in violation of Const., art 1, § 22, guaranteeing to the accused the right to be tried in the county in which the offense is alleged to have been committed. *State v. Reese*..... 507
3. CRIMINAL LAW (45, 50)—FORMER JEOPARDY—INSUFFICIENT CHARGE. Where defendant pleaded guilty and was convicted under a complaint insufficient to charge an offense, he cannot interpose the plea of former jeopardy. *State v. Collins*..... 201
4. SAME (45, 50)—FORMER JEOPARDY—CONVICTION IN JUSTICE COURT—PROCEEDINGS—STATUTES. The plea of former jeopardy cannot be interposed by a defendant convicted in a justice court upon his plea of guilty to the charge of assault, where the justice failed to comply with Rem. Code, §§ 1930, 1931, which provide that the justice shall summon the injured person and enforce his attendance at the trial if necessary, and shall not assess a fine or enter a judgment until a witness has been examined to state the circumstances of the transaction. *State v. Collins*..... 201
5. CRIMINAL LAW (103)—EVIDENCE—PARTS OF SAME TRANSACTION—RES GESTAE. In a prosecution for murder, the blood-stained garments of deceased's daughter, shot by defendant at the same time, are admissible as part of the same transaction. *State v. Lathrop* 560

Criminal Law—Continued.

6. SAME (104)—EVIDENCE—RES GESTAE—STATEMENTS OF PERSONS INJURED. In a prosecution for murder, exclamations of the deceased immediately after the shooting, as she sank down, are admissible as part of the *res gestae*. *State v. Lathrop*..... 560
7. SAME (110-112)—EVIDENCE OF OTHER OFFENSES—INTENT—ADMISSIBILITY. Upon a prosecution for bootlegging, under Laws of 1917, § 17h, it is proper to admit evidence of separate and distinct unlawful sales in order to prove guilty intent. *State v. Hessel*..... 53
8. SAME (158)—OPINION EVIDENCE—EXAMINATION OF EXPERTS—HYPOTHETICAL QUESTIONS. It is not error to exclude a hypothetical question which was argumentative and not confined to the facts which there was evidence to support. *State v. Lathrop*..... 560
9. SAME (216)—TRIAL—MISCONDUCT OF JUDGE—COMMENT ON EVIDENCE. In a prosecution for seduction, where the court was called upon to rule as to the admissibility of evidence that the female seduced was willing to accept the accused's offer of marriage, she being at the time adjudged criminally insane and mentally irresponsible, a remark by the court "that under the circumstances of this case" he had not the power, and if he had would not exercise his discretion, to receive the evidence, is not an unlawful comment on the evidence. *State v. Storrs*..... 675
10. CRIMINAL LAW (221)—TRIAL—RIGHT OF DEFENDANT TO INTERVIEW WITNESS—DISCRETION OF COURT. The right of an accused person to consult with important witnesses for the state is a matter resting largely in the discretion of the trial court, and no abuse of discretion is shown from a denial thereof, where on a charge of seducing one G. it appeared that she was in love with the accused, had been acquitted of murdering accused's wife on the ground of insanity, and was greatly under the influence of the accused. *State v. Storrs*. 675
11. SAME (236-1)—APPEAL—TRIAL—OPENING STATEMENT OF COUNSEL. Prejudicial error is not shown by the prosecuting attorney's overstatement of what the state would prove, where he had not had the usual opportunity to consult with the principal witness for the state, and his opening statement was not, generally speaking, unfair. *State v. Storrs*..... 675
12. CRIMINAL LAW (259)—TRIAL—INSTRUCTIONS—ASSUMING FACTS. In a prosecution for the violation of an ordinance, an instruction that accused would be guilty of "transporting liquor", within the meaning of the ordinance, if the jury believed that he hired and had control of a taxicab in which the suit cases containing liquor were carried, is prejudicial error in that it assumes the article transported was intoxicating liquor and also that the suit cases were carried and taken by the defendant. *Spokane v. Dale*..... 533

Criminal Law—Continued.

13. **CRIMINAL LAW (329)—TRIAL—INSTRUCTIONS AFTER SUBMISSION OF CASE.** The giving of instructions by the court on its own motion, after the jury had retired, and without request from jury or counsel, is not to be commended, though the error may not have been prejudicial. *State v. Hessel*..... 53
14. **SAME (384)—APPEAL—REVIEW.** The supreme court will not review alleged error in allowing an attorney to assist the prosecuting attorney, to which no objection was made or exception taken. *State v. Storrs*..... 675
15. **CRIMINAL LAW (451)—APPEAL—REVIEW—HARMLESS ERROR—CONDUCT OF COUNSEL.** Any prejudice from the prosecuting attorney's question to accused's counsel if he admitted certain matters, is cured where the court on objection immediately instructed the jury to disregard what had been said. *State v. Storrs* 675
16. **SAME (451)—APPEAL—REVIEW—HARMLESS ERROR—ARGUMENT OF COUNSEL.** Error cannot be predicated upon improper remarks or arguments where the court sustains objections thereto at the time and plainly directs the jury to disregard them, unless they were of such a character that they could not be cured. *State v. Storrs*.. 675
17. **CRIMINAL LAW (461)—CRUEL OR UNUSUAL PUNISHMENT—SEVERITY OF SENTENCE FOR BOOTLEGGING.** The fact that Laws of 1917, § 17h, declares the offense of bootlegging to be a felony, while other sections of the act merely make it a misdemeanor to sell liquor unlawfully, is no reason for declaring such section unconstitutional on the ground that it provides for cruel and unusual punishment, the legislature apparently deeming such offense more subversive of the morals of the community than that of possession or isolated sales, *State v. Hessel*..... 53

Crops:

Chattel mortgage on, see **CHATTel MORTGAGES**, 1.

Title of vendee to growing crops, see **VENDOR AND PURCHASER**, 1.

Cross-Appeals:

Necessity for, to review errors, see **APPEAL AND ERROR**, 13.

Cross-Examination:

See **WITNESSES**.

Crossings:

Accident at street railroad crossings, see **STREET RAILROADS**.

Cumulative Evidence:

As ground for new trial, see **NEW TRIAL**, 3.

Reception at trial, see **TRIAL**, 2.

Custody:

Support and custody of children, see **DIVORCE**.

Damages:

Harmless error in admission of evidence as to measure of, see **APPEAL AND ERROR**, 24.

For wrongful conversion of goods, see **CARRIERS**, 7, 8.

Condemnation of property taken for public use, see **EMINENT DOMAIN**, 5.

Parol evidence to vary release of, see **EVIDENCE**, 8.

For fraud, see **FRAUD**, 1.

Liability of landlord for disturbing possession of tenant, see **LANDLORD AND TENANT**, 1.

Release of claim for damages, see **RELEASE**.

In replevin, see **REPLEVIN**, 1, 3.

Breach by vendor of contract for sale of land, see **VENDOR AND PURCHASER**, 3.

1. **DAMAGES (14-1)—PERSONAL INJURIES—AGGRAVATION OF INJURY THROUGH MALPRACTICE OF PHYSICIAN.** Where an injured person, in good faith and in the exercise of reasonable care, employs a physician to treat his injury and it is aggravated through mistake or negligence, such negligence or mistake of the physician does not become an intervening cause, and he may recover damages for the injury he sustained, including aggravation thereto resulting from the mistake or improper treatment. *Yarrough v. Hines*..... 310
2. **DAMAGES (75)—MEASURE OF DAMAGES—BREACH OF CONTRACT—LOSS OF COMPENSATION FOR SERVICES.** Where the compensation agreed to be paid an attorney is contingent on the successful result of the suit, the measure of damages for a wrongful discharge from employment is the reasonable value of the services rendered, and not the contingent fee agreed upon. *Ramey v. Graves*..... 88
3. **DAMAGES (77)—MEASURE OF DAMAGES—BREACH OF CONTRACT TO DELIVER LOGS.** In an action for breach of contract to deliver logs in certain installments each month, covering a period of eight months after breach of the contract, an instruction fixing the measure of damages as the difference between the contract prices and the market prices at the date of breach of the contract, plus the reasonable cost of transporting other timber to the mill, is not prejudicial to the defendant, where the court could take judicial notice that the price of logs had increased during the period in question since the breach of the contract. *Clements v. Cook*..... 217
4. **DAMAGES (79)—PERSONAL INJURIES—PAIN AND SUFFERING.** A judgment for \$1,000 for loss of time, pain and suffering is not errone-

Damages—Continued.

- ous because of absence of proof of respondent's earning capacity during the time kept from his work, where it can be sustained by the element of pain and suffering, which is for the trier of the case. *Collins v. Nelson*..... 71
5. **DAMAGES (80)—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$2,000 for injuries sustained by the driver of a truck in collision with a street car is not excessive, where he sustained cuts over the ear and eye, and the right temple region which tore away part of the temple muscle and required several stitches, and that he had not regained use of the muscles at that point at the time of the trial and still suffered pain and headaches. *Beeman v. Tacoma Railway & Power Co.*..... 164
6. **DAMAGES (80)—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$1,000 for injuries sustained in an automobile collision, though excessive if measured by plaintiff's money loss incurred for medical attendance and for her loss of wages, will not be held excessive in view of severe injuries sustained, and pain and suffering for several weeks, precluding the court from saying, as a matter of law, that the award is excessive or prompted by prejudice or passion on the part of the jury. *Carlisle v. Hargreaves*..... 383
7. **DAMAGES (82)—PERSONAL INJURIES—EXCESSIVE VERDICT.** In an action for personal injuries sustained by the driver of a vehicle struck by an interurban train, which plaintiff claimed caused a rupture and partially prevented him from performing his customary labor, a verdict for \$1,000 will not be held excessive, though it appears that the jury might well have found a lesser verdict. *Ziomko v. Puget Sound Electric R.*..... 426
8. **DAMAGES (84)—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$5,500, reduced by the trial court to \$3,250, is not excessive, where plaintiff suffered a fracture of the lower end of the fibula, he was in a hospital for several weeks, the heel cord had shortened up so that in walking he could not put his heel on the ground, and his condition is shown to be serious and more or less permanent. *Yarrough v. Hines*..... 310
9. **DAMAGES (114)—ASSESSMENT—EVIDENCE—EXPENSES INCURRED—REASONABLE VALUE.** Error cannot be predicated upon the allowance of \$200 for repairs to an automobile because the only paid bill in evidence was for but \$12.15, where the respondent testified without objection to other payments made by him, and there was no specific objection that the reasonable value of the repairs was not shown. *Great Western Motors, Incorporated, v. Hibbard*..... 541

Dating:

Effect of ante-dating irrigation district bonds, see **WATERS AND WATER COURSES**, 6.

Dealers:

Implied warranty on sale of goods by dealer, see **SALES**, 7, 8.

Debt:

Extent of stockholders' liability for debts of bank, see **BANKS AND BANKING**, 1-3.

Payment of mortgage debt, see **MORTGAGES**, 3-6.

Public debt of city, see **MUNICIPAL CORPORATIONS**, 18-24.

Subrogation on payment of debts, see **SUBROGATION**.

Deduction of in computing inheritance tax, see **TAXATION**, 8.

Payment of debts under terms of will, see **WILLS**, 4.

Decedents:

Estates, see **EXECUTORS AND ADMINISTRATORS**.

Deceit:

See **FRAUD**.

Decision:

Review on appeal, see **APPEAL AND ERROR**, 1.

On appeal, see **APPEAL AND ERROR**, 30.

Of public service commission, final orders, see **CARRIERS**, 2.

Declarations:

Of injured person as part of *res gestae*, see **CRIMINAL LAW**, 6.

As evidence in civil actions, see **EVIDENCE**, 7.

Of party as creating partnership relation, see **PARTNERSHIP**, 2.

Decree:

Modification of, see **DIVORCE**, 2-8.

Scope and extent of on abatement of nuisance, see **NUISANCE**, 3, 4.

Deeds:

Tax deeds, see **TAXATION**, 5, 6.

Water rights, see **WATERS AND WATER COURSES**, 3.

1. **DEEDS (37)—PROPERTY CONVEYED—APPURTENANCES.** Sewage and water systems composed of springs, pumps, tanks, etc., attached to land belonging to a land company are not "appurtenances" within the meaning of deeds of conveyance of lots sold by the company; since real property cannot be appurtenant to real property. *Hurley v. Liberty Lake Co.*..... 207
2. **SAME.** The free use of sewage and water systems are not intended to pass as an "appurtenance" to lots sold by a land company,

Deeds—Continued.

where it appears that there was no representation to that effect in advertising circulars used in a vigorous selling campaign holding out alluring inducements to prospective purchasers, and no claim of oral representations to that effect by agents, or any assertion of the right by purchasers for a period of ten years. *Hurley v. Liberty Lake Co.*..... 207

Default:

Transfer of title on default in payment, see SALES, 4.

Defect:

Notice of in highway, see HIGHWAYS, 3.

In city street, see MUNICIPAL CORPORATIONS, 15-17.

In machinery as breach of warranty, see SALES, 5, 9, 10.

Defenses:

Pleading defenses, see PLEADING, 2, 3.

Delinquent Child:

Jurisdiction and custody of, see ADOPTION.

Delinquent Tax:

Sale and foreclosure for non-payment of taxes, see TAXATION, 3-6.

Delivery:

Of check, evidence of, see BILLS AND NOTES.

Of goods by carrier, see CARRIERS, 5-8.

Of goods to partnership, see PARTNERSHIP, 3.

Of goods sold, see SALES, 3, 5, 6.

Demand:

For proofs of loss, see INSURANCE.

For payment of money due as fixing time when interest begins to run, see INTEREST.

Demonstrative Evidence:

In civil actions, see EVIDENCE, 6.

Denials:

In pleading, see PLEADING, 3, 4.

Deposits:

In bank, see BANKS AND BANKING, 4.

Descent and Distribution:

Inheritance and transfer taxes, see TAXATION, 8-11.

Description:

- Of goods mortgaged, see CHATTEL MORTGAGES, 2.
- Of public improvement in ordinance therefor, see MUNICIPAL CORPORATIONS, 1.
- Of property in notice of sale, see TAXATION, 4.

Devises:

- See WILLS.

Discharge:

- See COMPROMISE AND SETTLEMENT.
- Of attorney, see ATTORNEY AND CLIENT.
- Of attorney from employment under contingent fee contract, see DAMAGES, 2.
- From claim for damages, see RELEASE.

Discretion of Court:

- Review in civil actions, see APPEAL AND ERROR, 14, 15.
- Apportionment of costs on appeal, see COSTS, 3.
- As to right of accused to interview witness, see CRIMINAL LAW, 10.
- Use of models as evidence, see EVIDENCE, 6.
- Reception of evidence, see TRIAL, 2.
- Reopening case for further evidence, see TRIAL, 4.

Discrimination:

- By carrier, see CARRIERS, 3, 4.

Districts:

- Creation of pest districts, see AGRICULTURE.
- Creation of pest districts as exercise of police power, see CONSTITUTIONAL LAW.
- Invalidity of law defining route traversed by carriers as criminal districts, see CRIMINAL LAW, 2.
- Irrigation districts, see WATERS AND WATER COURSES, 4-8.

Diversion:

- Of water course, see WATERS AND WATER COURSES, 1, 2.

Division Lines:

- See BOUNDARIES.

Divorce:

1. DIVORCE (100)—CUSTODY OF CHILDREN. Upon an issue as to the custody of children of a divorced couple, the welfare of the children is controlling and the rights of the husband and wife are equal. *Delle v. Delle*..... 512
2. DIVORCE (104)—CUSTODY OF CHILD—MODIFICATION OF DECREE. A divorce decree awarding the custody of a child to the mother, will

Divorce—Continued.

not be modified upon conflicting evidence where several trial judges refused the modification and charges of improper conduct by the mother were not substantiated but were sufficiently explained.

Sampson v. Sampson..... 1

3. DIVORCE (104)—CUSTODY OF CHILD—VISITATION BY PARENT—MODIFICATION OF DECREE. A divorced father cannot complain of an order modifying a decree of divorce so as to allow him to see his child only by having it brought to the juvenile court, it being clear that the court on a showing of former difficulties and misunderstandings, was but trying to find the most convenient way for him to see the child regularly. *Sampson v. Sampson*..... 1
4. DIVORCE (104)—CUSTODY OF CHILD—MODIFICATION OF DECREE. The evidence supports a finding that the welfare of a young child will be promoted by modifying a decree of divorce so as to award its custody to the mother though she may have been guilty of past delinquencies, where it appears that she was conducting herself properly at the time and had married again and her husband was able and willing to provide for the maintenance of the child. *Sorge v. Sorge*..... 131
5. SAME. Where the mother was given custody of a minor daughter upon modifying a decree of divorce, and asked for no allowance from the father for its support, but testified that her present husband was amply able to provide for the child, the father should be relieved of monthly payments of ten dollars for its support. *Sorge v. Sorge*..... 131
6. DIVORCE (104)—CUSTODY AND SUPPORT OF CHILD—MODIFICATION OF DECREE. Where, on appeal by the father from a judgment on petition to modify a divorce decree, which affirmed the original decree awarding custody of a minor daughter to the mother, the supreme court concludes that the mother is not a suitable person to have the custody and control of the daughter, but is unable, under the record, to advise the trial court what disposition should be made of the daughter owing to her hostile attitude toward the father at the time of trial, the judgment will be reversed and remanded for a further hearing to enable the trial court to award the custody to some person other than the mother, preferably to the father, if there has been a reconciliation between them. *O'Neil v. O'Neil*..... 160
7. DIVORCE (104)—DECREE—CUSTODY OF CHILDREN—MODIFICATION. Upon granting a divorce and awarding the custody of a child, there is a continuing jurisdiction in the court to modify the decree notwithstanding it provided that the husband's custody of the child should immediately terminate in case of his remarriage; since such

Divorce—Continued.

provision is not controlling where the welfare of the child is an issue. *Delle v. Delle*..... 512

8. SAME (104)—CUSTODY OF CHILDREN—DECREE—MODIFICATION—EVIDENCE—SUFFICIENCY. The custody of children of a divorced couple will not be changed to a new environment where their welfare would not be advanced, because of a past and undesirable relationship between the father and a young woman acting as his housekeeper, where they had subsequently married, nor because of some disagreement as to the visits of the mother to her children; but her right to visit the children will be provided for and enforced. *Delle v. Delle*..... 512

Documents:

As evidence in civil actions, see EVIDENCE, 7.

Draft:

Ownership of draft deposited for collection, see BANKS AND BANKING, 4.

Drafting of will by beneficiary, see WILLS, 1, 2.

Easements:

1. EASEMENTS (12)—IMPLIED EASEMENTS—CREATION. The essentials of an easement by implication are (1) a separation of title; (2) a permanent use before separation impressed upon one part of the estate in favor of the other; which (3) shall be necessary to the beneficial enjoyment of such part. *Bailey v. Hennessey*..... 45
2. SAME. The necessity for an easement by implication is such reasonable necessity as renders the easement essential to the convenient or comfortable enjoyment of the property as it existed before severance of title. *Bailey v. Hennessey*..... 45
3. EASEMENTS (12, 13)—IMPLIED EASEMENTS—EVIDENCE—SUFFICIENCY. An implied easement in the right to the use of an alley-way by the owner of a building engaged in the feed business is sufficiently shown by evidence that the common grantor of the adjoining lots erected buildings upon the lots with a view of using the alley-way provided in the rear, that such use was intended to be of permanent character and was notorious and plainly visible, that the alley-way was so used for fourteen years and was necessary to the beneficial enjoyment of the property. *Bailey v. Hennessey*..... 45

Ejectment:

1. EJECTMENT (48, 50) — IMPROVEMENTS (4)—SET-OFF — LIEN FOR IMPROVEMENTS—ADVERSE CLAIM OF TITLE. Under Rem. Code, § 797, allowing the defendant in ejectment to recover the value of improve-

Ejectment—Continued.

ments placed upon property adversely held in good faith under claim of right, there can be no lien for improvements placed on property by permission of the owner for the benefit of defendant while occupying the premises by sufferance without any claim of right. *Wallace v. Wallace*..... 14

Elections:

For construction of public improvements, see MUNICIPAL CORPORATIONS, 1.

Submission of question of issuing municipal bonds, see MUNICIPAL CORPORATIONS, 21-24.

Elevators:

Injury from dangerous elevator in school building, see SCHOOLS AND SCHOOL DISTRICTS.

Eminent Domain:

Public improvements by municipalities, see MUNICIPAL CORPORATIONS, 5-8.

Failure of vendor's title through condemnation of property, see VENDOR AND PURCHASER, 2.

1. EMINENT DOMAIN (8)—BY CITIES—POWERS—PROPERTY IN OTHER STATE—WATER SUPPLY—STATUTES. Under Rem. Code, § 7612 and § 8005 granting cities power to acquire waterworks within or without the corporate limits, the city of Walla Walla has power to acquire and own property situated in the state of Oregon, upon consent of that state, for the purpose of making extensions and betterments to its waterworks system; and the exercise of such power is not the assumption of extra-territorial jurisdiction over property situated in another state. *Langdon v. Walla Walla*..... 446
2. SAME (8, 11)—POWERS OF CITY—PROPERTY IN OTHER STATE—STATUTES—VALIDITY. Laws of Oregon, ch. 182, p. 256, enacted February, 23, 1909, granting to municipal corporations of any state adjoining the state of Oregon power to purchase or condemn lands within the state of Oregon for the purpose of obtaining a water supply, which was followed in all particulars by the enactment by this state on the following day of an act granting reciprocal powers to the cities of the state of Oregon, is not unconstitutional in that it permits the right to condemn property of that state for a public use for the benefit of the people of another state, but will be held a valid exercise of the state's power of eminent domain to further the public interests of a sister state, in return for reciprocal privileges to the cities of Oregon. *Langdon v. Walla Walla*..... 446

Eminent Domain—Continued.

3. **EMINENT DOMAIN (14, 39)—STATE HIGHWAYS—NECESSITY OF APPROPRIATION—EVIDENCE—SUFFICIENCY.** The evidence shows a reasonable necessity for a proposed state highway through farming lands of the relators, where it appears that the use of the present county roadway through a small town would entail the expenditure of large sums in the building of a viaduct and bridges, that the proposed route is a half mile shorter and eliminates excessive grades, curves and two railroad crossings at grade, and that the Federal government refused to aid in the enterprise should adverse plans proposed by the county be adopted. *State ex rel. Urquhart v. Superior Court*.... 34
4. **SAME (14, 39)—LOCATION OF ROUTE—NECESSITY—APPROPRIATION ACT—STATUTES.** The act of 1919, ch. 92, p. 223, appropriating funds for the construction of that part of the North Central Highway between Harrington and Wilson Creek, does not preclude use of the funds in the construction of the highway along a proposed route that does not run through the town of Wilson Creek; since the locating act, Laws of 1919, ch. 110, p. 268, omitted any mention of Wilson Creek and merely provided for the most feasible route between Ephrata and Krupp, and the evidence showed no feasible route to which the appropriation relates that will reach nearer the corporate limits of Wilson Creek than the route selected. *State ex rel. Urquhart v. Superior Court*..... 34
5. **EMINENT DOMAIN (93)—PERSONS ENTITLED—VENDEE—EXECUTORY CONTRACT.** The vendee in a forfeitable executory contract for the purchase of land acquires no title to or interest in the land until the contract is fully performed, and hence is not a "party interested" or entitled to the award in condemnation proceedings to acquire land for the Camp Lewis army post, under Laws of 1917, p. 2, ch. 3. *Schaefer v. Gregory Co.*..... 408
6. **SAME (104)—PROCEEDINGS—CONDITIONS PRECEDENT—LOCATION OF ROAD—STATUTES.** Reim. Code, § 5870, providing that no appropriation for the construction of a state road shall be expended thereon until the state highway board shall have declared the road feasible and approved maps, plans and specifications submitted by the highway commissioner after survey of the entire length of such highway and the making of outline and profile maps, must be held to be modified by the act of 1919, ch. 92, p. 223, making appropriation for the purpose of meeting the cost of constructing only specified parts of the state's highways. *State ex rel. Urquhart v. Superior Court*..... 34

Employees:

See MASTER AND SERVANT.

Entry:

Of judgment, see JUDGMENT, 1.

Equalization:

Of taxes, see TAXATION, 2.

Equity:

See SUBROGATION.

Necessity of exceptions to findings in equity case, see APPEAL AND ERROR, 3.

Legal or equitable action, see JURY.

Abatement of nuisance, see NUISANCE.

Escheat:

Of lands held by alien, see ALIENS.

Establishment:

Of irrigation district, see WATERS AND WATER COURSES, 4-8.

Estimates:

Of cost of irrigation project, see WATERS AND WATER COURSES, 4.

Estoppel:

To avoid insurance policy, see INSURANCE.

By judgment, see JUDGMENT, 2.

Affecting priorities of mortgages, see MORTGAGES, 4.

To deny partnership, see PARTNERSHIP, 2.

1. ESTOPPEL (48, 54)—LANDLORD AND TENANT (12)—RATIFICATION OF INVALID LEASE. The lessor of premises under an invalid lease for a term of years is not estopped to deny that the lease was valid for more than one year because he sold horses, feed and grain to the lessee at the time of and after execution of the lease, it appearing that the purchases were an accommodation to the lessee in farming the land the first year, and were not a part consideration for the lease. *Hinkhouse v. Wacker*..... 253

Evidence:

In actions on accounts, see ACCOUNT, ACTION ON.

Hostile character of possession, see ADVERSE POSSESSION.

Of good faith in declaration of intention to become citizen, see ALIENS, 1.

Review of rulings as dependent on presentation of objection or exception in lower court, see APPEAL AND ERROR, 2.

Review of rulings as dependent on presentation by record, see APPEAL AND ERROR, 11, 12.

Review of rulings involving discretion of court, see APPEAL AND ERROR, 14.

Harmless error on appeal, see APPEAL AND ERROR, 23-26.

Value of attorney's services, see ATTORNEY AND CLIENT.

Of indorsement and delivery of checks, see BILLS AND NOTES.

Evidence—Continued.

- To establish boundaries, see **BOUNDARIES**.
Discrimination by carrier in granting milling-in-transit privilege, see **CARRIERS**, 3, 4.
Of compromise, see **COMPROMISE AND SETTLEMENT**.
In criminal prosecutions, see **CRIMINAL LAW**, 5-8.
Comment on by judge, see **CRIMINAL LAW**, 9.
For assessment of damages, see **DAMAGES**, 9.
Property conveyed by deed, see **DEEDS**.
Sufficiency for modification of decree, see **DIVORCE**, 2, 4, 8.
Creation and existence of easement, see **EASEMENTS**, 3.
As to public necessity for exercise of condemnation, see **EMINENT DOMAIN**, 3.
In action for fraud, see **FRAUD**.
Oral evidence to show essentials of memorandum of sale, see **FRAUDS, STATUTE OF**, 4.
Contributory negligence of driver of team down steep grade, see **HIGHWAYS**, 4.
Of bootlegging, see **INTOXICATING LIQUORS**, 2.
Of damage to business of lessee, see **LANDLORD AND TENANT**, 1.
Cause of accident to employee, see **MASTER AND SERVANT**, 3.
Of mental capacity to execute mortgage, see **MORTGAGES**, 1.
Of want or failure of consideration, see **MORTGAGES**, 7.
As to benefits to property from public improvements, see **MUNICIPAL CORPORATIONS**, 6.
Negligence of driver as proximate cause of collision, see **MUNICIPAL CORPORATIONS**, 12.
Newly discovered evidence as ground for new trial, see **NEW TRIAL**, 3.
Of novation, see **NOVATION**.
For abatement of slaughter house as nuisance, see **NUISANCE**, 1.
In action by or against partnership, see **PARTNERSHIP**, 3.
Admissibility of evidence under pleading, see **PLEADING**, 3, 4.
Of fraud in procuring release of claim for damages, see **RELEASE**, 3, 4.
For breach of contract of sale, see **SALES**, 5, 6.
To sustain conviction, see **SEDUCTION**, 5.
Negligence causing injuries to persons on or near tracks, see **STREET RAILROADS**, 2-4.
Excessive valuation of property for taxation, see **TAXATION**, 7.
Reception at trial, see **TRIAL**, 1-3.
Applicability of instructions to evidence, see **TRIAL**, 6.
Of deflection of waters by bridge pier, see **WATERS AND WATER COURSES**, 2.
Undue influence procuring bequest, see **WILLS**, 2.
Competency, attendance, credibility and examination of witnesses, see **WITNESSES**.

Evidence—Continued.

1. EVIDENCE (16, 18)—JUDICIAL NOTICE. The court will take judicial notice of the prices fixed for timber by the war industry board during the time the Federal government had control of the logging industry in the state, and of the fact that there was a steady and increasing demand for all kinds of milling logs after the Federal government released control. *Clements v. Cook*..... 217
2. EVIDENCE (37, 49)—RELEVANCY—FACTS RELEVANT TO PARTICULAR ISSUES—THREATS BY THIRD PERSONS. In an action by one timber company against another for damages from fire, evidence of threats made by members of the I. W. W. is admissible as to the origin of the fire, there being proof that the fire occurred on the day defendant resumed operations after a strike brought on by I. W. W. members, many of whom were in the immediate neighborhood and capable of carrying out their threats. *Sound Timber Co. v. Danaher Lumber Co.*..... 314
3. EVIDENCE (60)—SIMILAR TRANSACTIONS—FRAUD—GENERAL SCHEME. Upon an issue as to fraud in the sale of an automobile to defendant by plaintiff by misrepresenting the year of the car, evidence that plaintiff had sold the same car to witness by making similar false representations, is inadmissible to prove plaintiff's fraudulent intent; inasmuch as proof of fraudulent intent was not material or essential to hold plaintiff liable for positive misrepresentations of matters of fact. *Great Western Motors, Incorporated, v. Hibbard* 541
4. EVIDENCE (79)—BEST AND SECONDARY EVIDENCE—PROOF OF EFFORT TO SECURE PRIMARY EVIDENCE. Oral testimony of the contents of a written instrument is not admissible upon mere proof that the writing had been sent to a party in another city and that an attempt had been made to secure it for the trial, but that it had not been returned; since a reasonable effort to secure the writing was not shown. *Roslyn v. Pavllovich*..... 306
5. SAME (79)—CONTENTS OF LETTER—ADMISSIBILITY. It was error to allow witness to testify to the contents of a letter which he said he had received but did not have with him, but was in his office, since the letter itself was the best evidence of its contents, and no sufficient excuse was shown for failure to produce it in court. *Roslyn v. Pavllovich*..... 306
6. EVIDENCE (83) — DEMONSTRATIVE EVIDENCE — MODELS—DISCRETION OF COURT. In an action to recover the price of school desks manufactured for the defendant, it is discretionary to refuse to allow defendant to display other desks for comparison, it not being shown that the model desks were of the same quality or character as those delivered. *Harrild v. Spokane School District*..... 266

Evidence—Continued.

7. **EVIDENCE (127)—DOCUMENTARY EVIDENCE—ACCOUNT BOOKS—SELF-SERVING DECLARATIONS.** In an action on an account in which defendants claimed a novation agreement whereby purchasers of their mill assumed the account and they were released, it was not error to refuse to admit plaintiff's account books in evidence to show that no transfer of the assumed account had been entered therein, since the same would amount to the admission of self-serving declarations, and not as declarations against interest. *Seal v. Long*... 370
8. **EVIDENCE (179)—PAROL TO VARY WRITING—OPERATION AND EFFECT OF RELEASE.** The plain terms of an unambiguous release of damages cannot be contradicted by parol testimony that the release was not intended to include what the language expressly shows was included. *Betcher v. Kunz*..... 563
9. **SAME (211)—OPINION EVIDENCE—COMPETENCY OF EXPERTS—VALUE.** A witness who had been in the business of selling and buying automobiles for twenty-two years, and was familiar with Paige cars of 1917 and 1918, is competent to testify as an expert as to their value. *Great Western Motors, Incorporated, v. Hibbard*..... 541

Exceptions:

Necessity for exceptions for purpose of review, see **APPEAL AND ERROR**, 3, 4; **CRIMINAL LAW**, 14.

Excessive Damages:

See **DAMAGES**, 4-8.

Excessive Tax:

See **TAXATION**, 2, 7.

Execution:

Of contract, see **SALES**, 1.

Of tax deed, see **TAXATION**, 5.

Executors and Administrators:

Appellate jurisdiction of probate cases, see **APPEAL AND ERROR**, 1.

Necessity of administration of estate in computing inheritance tax, see **TAXATION**, 8.

Construction of powers of executors as to payment of debts, see **WILLS**, 4.

1. **EXECUTORS AND ADMINISTRATORS (4) — APPOINTMENT — RIGHT TO LETTERS—NONRESIDENT HEIRS—JURISDICTION.** The court has jurisdiction to appoint an administrator within forty days after the death of the decedent, where the petition was in proper form and contained all the essentials necessary to give the court jurisdiction under the probate code, Laws of 1917, p. 657, § 62, and there was

Executors and Administrators—Continued.

no surviving wife nor any heirs living within the state and eligible to appointment under Id., p. 663 § 87. *In re Utters' Estate*..... 197

2. SAME (12) — APPOINTMENT — PREFERRED CLASSES — NOMINEES BY NEXT OF KIN. The right granted to the next of kin by the probate code, Laws of 1917, p. 656, § 61, subd. 2, is a preference right to appointment as administrator only, and no right is given to nominate another for appointment, such right being given only to the surviving spouse, under Id., subd. 1. *In re Utters' Estate*..... 197

3. EXECUTORS AND ADMINISTRATORS (160)—SETTLEMENT OF ACCOUNT—COUNSEL FEES. Under Laws of 1917, p. 687, § 158, allowing to an executor or administrator necessary attorney's fees, they are to be allowed in such sum as the court deems just and reasonable; and it must be presumed, in the absence of a statement of facts, that the allowance was based on the services rendered as shown by the record. *In re Babcock's Estate*..... 556

Exemptions:

From inheritance tax, see TAXATION, 11.

Expenses:

As element of damages, see DAMAGES, 9.

Expert Testimony:

In criminal prosecutions, see CRIMINAL LAW, 8.

In civil actions, see EVIDENCE, 9.

Explosives:

Injury to employee from explosion of gasoline, see MASTER AND SERVANT, 2, 3.

Extra Cost:

Right of contractor to recover under clause allowing optional use of fixtures in building, see CONTRACTS, 1, 2.

False Representations:

In sale of apartment house, see FRAUD.

Family Allowance:

In computing inheritance tax, see TAXATION, 10.

Fees:

Attorney, see ATTORNEY AND CLIENT.

Of attorneys in administration of estates, see EXECUTORS AND ADMINISTRATORS, 3.

Ferries:

1. FERRIES—LICENSE TO OPERATE—EXCLUSIVE RIGHT—STATUTES. After issuance of a license for the operation of a ferry, the county com-

Ferries—Continued.

missioners have no power to license the operation of another ferry at the same place, or in such close proximity as to destroy the exclusive nature of the privilege, granted in such case by Rem. Code, § 5009, notwithstanding the county commissioners testified that it was not their intention to grant an exclusive franchise. *Anderson v. Glenn*..... 31

Filing:

Chattel mortgage, see CHATTEL MORTGAGES, 3.
Cost bill, see COSTS, 2.
Claims against county, see COUNTIES, 2, 3.

Findings:

Review as dependent on presentation of objection, or exceptions below, see APPEAL AND ERROR, 3, 4.
Review of errors as dependent on record on appeal, see APPEAL AND ERROR, 11.
Review on appeal or writ of error, see APPEAL AND ERROR, 18-20.

Fires:

Evidence of threats by third persons, see EVIDENCE, 2.
Caused by operation of railroad, see RAILROADS.

Fixtures:

Rights of contractor under contract allowing optional use of fixtures in building, see CONTRACTS, 1, 2.

Floods:

See WATERS AND WATER COURSES, 1, 2.

Foreclosure:

Of mortgage, see MORTGAGES, 1, 7, 8.
Of mortgage by pledgee of notes, see PLEDGES.
Of tax lien, see TAXATION, 3-6.

Form:

Of judgment, see REPLEVIN, 2.

Former Adjudication:

As bar to action, see JUDGMENT, 2.

Former Jeopardy:

Bar to prosecution, see CRIMINAL LAW, 3, 4.

Fraud:

Evidence of similar previous transactions to show fraud, see EVIDENCE, 3.
Release procured by fraud, see RELEASE, 3, 4.

Fraud—Continued.

1. **FRAUD (21, 23)—MEASURE OF DAMAGES—EVIDENCE—ADMISSIBILITY.** Upon an issue as to fraud in misrepresenting the value of an apartment house sold to defendant, defendant cannot assert error in refusing to allow evidence of the market value of the house at the time of the sale, where the theory of her defense to an action for the price was an affirmance of the contract and a recoupment in damages for amounts she claimed to have expended in putting the house in as good condition as it was represented to be in. *Turner v. Eddy*..... 652
2. **SAME (22)—MISREPRESENTATION—EVIDENCE—SUFFICIENCY.** A finding against the defense of fraud in misrepresenting the condition of an apartment house sold to the defendant, is sustained by evidence that defendant was experienced in running such houses, voluntarily sought and persisted in making the purchase after visiting the house five times and making all the inspection desired, and that a boiler, claimed by her to be defective, was inspected by her and her janitor, and she requested an inspection by city authorities, but concluded the deal without waiting therefor, and the evidence upon other points was conflicting, and she made no complaint relating to matters she learned of within a few days time, until weeks after maturity of the note for the purchase price. *Turner v. Eddy*... 652

Frauds, Statute Of:

1. **FRAUDS, STATUTE OF (7-1) — AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR—NOVATION.** An agreement of novation is not void under the statute of frauds for the reason that the plaintiffs agreed at that time to allow the purchaser of a mill to satisfy the assumed account by payments extending over a period of one year, where the agreement of novation was complete and separable and a consideration for the transfer of the property at the time it was made, and unaffected by the agreement as to the time of payment of the assumed account, which was wholly between the plaintiffs and the purchasers of the mill. *Seal v. Long*..... 370
2. **FRAUDS, STATUTE OF (34)—SALE OF GOODS—MEMORANDUM—SUFFICIENCY.** A letter written by the seller of logs, offering to let the buyer have "fir" at a certain price is insufficient as a memorandum to satisfy the statute of frauds, since it failed to designate the quantity to be sold. *Lewis v. Elliot Bay Logging Co.*..... 83
3. **SAME (34)—SALE OF GOODS—MEMORANDUM—SUFFICIENCY.** Where a memorandum, signed by the seller of goods, failed to designate the quantity to be sold, he cannot be held liable upon the letter of the buyer which, for the first time, sufficiently designated the quantity of the subject-matter of the sale, since the seller could not be charged upon a memorandum which he did not sign. *Lewis v. Elliot Bay Logging Co.*..... 83

Frauds, Statute of—Continued.

4. SAME (34, 58)—SALE OF GOODS—MEMORANDUM—PAROL EVIDENCE TO SHOW ESSENTIALS. The quantity of the subject-matter of a sale of goods being an essential term of the memorandum of sale, parol evidence is not admissible to show that the word "fir", used in a letter written by the seller to the buyer, referred to a raft of logs and the quantity thereof. *Lewis v. Elliot Bay Logging Co.*..... 83
5. FRAUDS, STATUTE OF (44) — OPERATION OF STATUTE — MODIFICATION OF CONTRACT. Upon a vendor's refusal to deliver logs under a written contract, because of default in the payments, an oral agreement to continue deliveries if the purchaser would furnish security, which was done, is not objectionable as an oral agreement to modify the contract within the statute of frauds. *Clements v. Cook*..... 217
6. SAME (44)—MODIFICATION OF WRITTEN CONTRACT. A contract required by statute to be in writing may be modified by an executed oral agreement. *Clements v. Cook*..... 217
7. SAME (44, 60)—MODIFICATION OF CONTRACT—INSTRUCTIONS. Upon an issue as to an oral modification of a written contract, required by statute to be in writing, it is not error to fail to instruct the jury that the proof must show a written modification or be of the clearest and most satisfactory kind; since it is for the court to first determine whether there is positive, definite and unambiguous testimony of the modification sufficient to sustain the burden of proof, and if so, to submit it to the jury to determine whether it preponderates over evidence to the contrary. *Clements v. Cook*..... 217

Funds:

For construction of state highway, see EMINENT DOMAIN, 4, 6.

Garnishment:

Judgment as *res judicata*, see JUDGMENT, 2.

1. GARNISHMENT (32) — LIABILITY OF GARNISHEE — ASSIGNMENT OF CLAIMS PENDING GARNISHMENT. An assignment by the garnishee for a past consideration, after service of the writ and insolvency of the defendant, will not relieve him from liability to the plaintiff. *Oberleitner v. Moore*..... 592
2. GARNISHMENT (54)—PROCEEDINGS—COSTS. Where plaintiff is successful in garnishment proceedings below, he is entitled to costs in that court. *Oberleitner v. Moore*..... 592

General Denial:

See PLEADING, 2, 4.

Good Faith:

Of alien's declaration of intention to become citizen, see ALIENS, 1.

Governmental Functions:

Liability of city in performance of, see MUNICIPAL CORPORATIONS, 14.

Guaranty:

Subrogation to rights of coguarantor, see SUBROGATION.

Guardian and Ward:

1. GUARDIAN AND WARD (14) — REMOVAL OF GUARDIAN OF ESTATE. There was no abuse of the court's discretion in removing appellant as guardian of his child's estate after divorce granted to the parties, where the interests of the child would be benefited by a change, since the child's interests must be the chief consideration. *Sampson v. Sampson*..... 1
2. GUARDIAN AND WARD (13) — SALES OF REAL ESTATE — CONFIRMATION. A guardian's sale of real estate, without notice, under powers granted in a decree of divorce granting the property to the child of the divorced parties, will not be confirmed upon a showing that money was needed to take care of the mortgage and taxes and that the house was often vacant and needed repairs, where the mother testified that the father interfered with renting the house and that the income derived from the amount realized on a sale would not equal the amount received by renting the property. *Sampson v. Sampson*..... 1

Habeas Corpus:

1. HABEAS CORPUS (5, 8-1) — GROUNDS FOR RELIEF — JURISDICTION — ERRORS AND IRREGULARITIES. The validity of a judgment of a court of competent jurisdiction cannot be tested in habeas corpus proceedings, no matter to what extent error may have been committed and even though the judgment was voidable because of want of jurisdiction to render it, where the court had jurisdiction of the subject-matter and erroneously decided the question of its jurisdiction of the case. *In re Parent*..... 620
2. HABEAS CORPUS (22) — COMMITMENT FOR CONTEMPT — SCOPE OF INQUIRY. Upon habeas corpus proceedings to release a prisoner, a commitment by a court of competent jurisdiction adjudging him guilty of contempt in violating an injunction and sentence to imprisonment for a definite term, shows legal cause for the imprisonment which cannot be inquired into. *In re Parent*..... 620

Harmless Error:

In civil actions, see APPEAL AND ERROR, 21-29.

In criminal prosecutions, see CRIMINAL LAW, 15, 16.

Health:

Municipal ordinances providing precautions against disease, see MUNICIPAL CORPORATIONS, 9.

Liability for acts of officers in enforcing health quarantine, see MUNICIPAL CORPORATIONS, 14.

Hearing:

Of application for change of venue, see **VENUE**, 2.

Heirs:

Right of nonresident heirs to letters of administration, see **EXECUTORS AND ADMINISTRATORS**, 1.

Highways:

Appropriation of land for highways, see **EMINENT DOMAIN**, 3, 4, 6.

Defects in city streets, see **MUNICIPAL CORPORATIONS**, 15-17.

1. **HIGHWAYS (53)—LAW OF THE ROAD—APPLICATION.** The statutes requiring travelers to keep to the right upon a public highway have reference to vehicles, and do not refer, in express terms or by necessary implication, to pedestrians; nor do they require the user to keep to the right in traveling, but cover only the meeting and passing of traffic. *Marton v. Pickrell*. 117
2. **HIGHWAYS (53, 58) — COLLISION — INJURY TO PEDESTRIAN — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.** Whether defendant used necessary care to avoid an accident and whether plaintiff was guilty of contributory negligence, are questions for the jury, where plaintiff, walking upon the left-hand side of a paved highway after dark, stepped toward the center of the road upon seeing defendant's car approaching, and continued to do so upon seeing that the car also turned toward the center of the road, and he was struck when he had reached a point about midway between the center and the right-hand edge of the pavement. *Marton v. Pickrell*. 117
3. **HIGHWAYS (64) — INJURIES TO TRAVELER — NOTICE OF DEFECT.** A county is not liable for injuries sustained by a traveler through a skidding of his wagon off a curve on a steep mountain road by reason of the dangerous and slippery condition of the roadway caused by the freezing of water escaping from an irrigation ditch, there being no proof that the county had knowledge of the existence of water in the ditch at that time of the year, and it not appearing that at other times the water and mud caused thereby created a dangerous condition. *Mead v. Chelan County*. 97
4. **SAME (65) — CONTRIBUTORY NEGLIGENCE — APPARENT DANGERS — EVIDENCE — SUFFICIENCY.** The driver of a heavy team and wagon carrying a very heavy load down a road containing sharp curves and steep grades is guilty of contributory negligence precluding a recovery for injuries sustained through the skidding of the wagon off a sharp curve covered with ice, he being familiar with the locality and having actual notice of the ice in the roadway before coming to the place of the accident, and so fully appreciated the probability of danger as to stop his team and examine his brakes before entering upon the curve. *Mead v. Chelan County*. 97

Homicide:

Res gestae in prosecution for, see CRIMINAL LAW, 5, 6.

1. HOMICIDE (111) — TRIAL — INSTRUCTIONS — SELF-DEFENSE. In a prosecution for murder, where there was no evidence on the subject, an instruction as to self-defense is properly refused. *State v. Lathrop*..... 560

Husband and Wife:

Divorce and judicial separation, see DIVORCE.

1. HUSBAND AND WIFE (69)—COMMUNITY PROPERTY—LEASE BY HUSBAND ALONE—VALIDITY. An unacknowledged lease of community property, signed by the husband alone, is good only for one year. *Hinkhouse v. Wacker*..... 253

Hypothetical Questions:

In examination of expert witnesses, see CRIMINAL LAW, 8.

Impeachment:

Of witnesses, see WITNESSES, 2, 3.

Implication:

Creation of easement, see EASEMENTS.

Implied Contracts:

To purchase goods, see SALES, 2.

Implied Warranty:

On sale of goods, see SALES, 7, 8.

Imprisonment:

Inquiry into legality of, see HABEAS CORPUS, 2.

Improvements:

Allowance or recovery of compensation in ejectment, see EJECTMENT.
Public improvements, see MUNICIPAL CORPORATIONS, 1-8.

Inadequate Price:

As ground for vacating tax sale, see TAXATION, 3.

Inconsistent Defenses:

See PLEADING, 2.

Incumbrances:

See MORTGAGES.

Indemnity Insurance:

See INSURANCE.

Indictment and Information:

Conviction on insufficient charge as former jeopardy, see **CRIMINAL LAW**, 3.

Indorsement:

Of check, evidence of, see **BILLS AND NOTES**.

Industrial Insurance:

See **MASTER AND SERVANT**, 1.

Infants:

See **GUARDIAN AND WARD**.

Adoption of, see **ADOPTION**.

Custody and support on divorce of parents, see **DIVORCE**.

Inheritance Tax:

See **TAXATION**, 8-11.

Injunction:

Disobedience of as contempt, see **CONTEMPT**.

Abatement of nuisance, see **NUISANCE**.

Prevention of proceedings relating to injunction, see **PROHIBITION**.

1. **INJUNCTION (73) — VIOLATION — JUDGMENT OF CONTEMPT.** The superior court has jurisdiction to adjudge one guilty of contempt of court for violating its injunction, and to sentence such person to jail for a specified period. *In re Parent*..... 620

Insane Persons:

Mental capacity of parties to mortgage, see **MORTGAGES**, 1.

Insolvency:

Parties entitled to notice of appeal in receivership proceedings, see **APPEAL AND ERROR**, 5, 6, 9.

Extent of stockholder's liability, see **BANKS AND BANKING**, 1-3.

Liability of stockholder of insolvent bank for interest, see **INTEREST**.

Subrogation on payment of debts of insolvent corporation, see **SUBROGATION**.

Instructions:

Review as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 21, 27-29.

In criminal prosecutions, see **CRIMINAL LAW**, 12, 13; **HOMICIDE**; **INTOXICATING LIQUORS**, 3, 4.

In civil actions, see **TRIAL**, 5-8.

Insurance:

1. **INSURANCE (116) — INDEMNITY INSURANCE — LIABILITY FOR LOSS — DEMAND FOR PROOFS OF LOSS — ESTOPPEL.** Under a bank clerk's indemnity bond conditioned that the insured should not be liable unless

Insurance—Continued.

the loss be disclosed during continuation of the policy or within fifteen months after termination, the insurance company is not estopped from denying liability from the fact that it asked for proofs of loss twenty-one months after cancellation of the policy, where the insured had not incurred any expense in attempting to furnish information necessary to the making of the proofs of loss, and had not been prejudiced in any way in reliance on the waiver, and the parties had simply proceeded for a few days upon the mistaken presumption that there was an existing policy. *Bankers Trust Co. v. American Surety Co.*..... 172

Intent:

Evidence of other offense to prove intent, see CRIMINAL LAW, 7.
Evidence of similar facts and transactions to show intent, see EVIDENCE, 3.

Interest:

See USURY.
On inheritance tax, see TAXATION, 9.
Irrigation bonds, see WATERS AND WATER COURSES, 6.

1. INTEREST (25) — SUPERADDED LIABILITY OF STOCKHOLDER. Where demand was made upon a stockholder of an insolvent bank for payment of his superadded liability, he is liable for interest at the legal rate of six per cent from the time of such demand, upon the amount of his proportional liability found to be due. *Fremont State Bank v. Vincent*..... 493

Intoxicating Liquors:

Evidence of other offenses, see CRIMINAL LAW, 7.
Goods sold for illegal purpose, recovery of price, see SALES, 11.

1. INTOXICATING LIQUORS (30)—OFFENSES—ILLEGAL POSSESSION—INTENT TO SELL—OVERT ACT. Laws of 1917, § 17h, defining a "bootlegger" as any person who carries about intoxicating liquor with the purpose of unlawful sale of the same, and declaring such crime to be a felony, is not unconstitutional in that it attempts to punish an intent to do an act not coupled with an overt criminal act, since it is not the intent which is punished, but the act of peddling liquor with intent to sell it. *State v. Hessel*..... 53
2. INTOXICATING LIQUORS (50) — BOOTLEGGING — EVIDENCE — SUFFICIENCY. The evidence is sufficient to sustain a conviction of bootlegging, under Laws of 1917, § 17h, where it shows a sale of bottled whiskey to the prosecuting witness in a hotel room, and though the evidence was stronger in tending to show unlawful possession or an unlawful sale, yet there was sufficient from which the jury might have found that defendant was guilty of the crime charged, and not of unlawful possession or sale. *State v. Hessel*..... 53

Intoxicating Liquors—Continued.

3. **INTOXICATING LIQUORS (51) — BOOTLEGGING — INSTRUCTIONS ELIMINATING OTHER OFFENSES.** Upon a prosecution for bootlegging, under Laws of 1917, § 17h, it is error to refuse requested instructions that defendant was not being prosecuted for other offenses and could only be convicted of carrying liquor about for the purpose of unlawful sale, where the jury might be misled by evidence of sales which was admitted to show intent, or evidence which might induce the belief that defendant had solicited orders or kept a place for the unlawful sale of liquor. *State v. Hessel*. 53
4. **SAME (51) — BOOTLEGGING — INSTRUCTIONS AS TO OTHER OFFENSES.** In a prosecution for bootlegging, under Laws of 1917, § 17h, it is error for the court to instruct that it is not necessary for the state to prove matters and things contained in the balance of the section, which the court had just quoted, as it tended to confuse the issue by calling attention to matters upon which there was no evidence, and to a crime with which defendant was not charged. *State v. Hessel*. 53

Irrigation:

See **WATERS AND WATER COURSES**, 4-8.

Right to supersedeas on appeal from order depriving company of water supply, see **APPEAL AND ERROR**, 10.

Issues:

Evidence admissible under pleadings, see **PLEADING**, 3, 4.

Instructions to jury, see **TRIAL**, 6.

Jeopardy:

Former jeopardy bar to prosecution, see **CRIMINAL LAW**, 3, 4.

Joint Tort Feasors:

Effect of release of one, see **RELEASE**, 1.

Judges:

Conduct of judge in criminal trial, see **CRIMINAL LAW**, 9.

Change of venue for prejudice of judge, see **VENUE**, 1.

Judgment:

Review in general, see **APPEAL AND ERROR**.

On appeal, see **APPEAL AND ERROR**, 30.

Modification, see **DIVORCE**, 2-8.

Inquiry as to validity of, see **HABEAS CORPUS**, 1.

Of contempt for violation of injunction, see **INJUNCTION**.

Abatement of nuisance, see **NUISANCE**.

Alternative judgment, see **REPLEVIN**, 2, 3.

1. **JUDGMENT (70, 109) — ENTRY — TIME FOR ENTRY — VACATION — IRREGULARITIES.** Where a motion for a new trial was granted unless

Judgment—Continued.

plaintiff remitted \$2,000 from the verdict, the clerk's entry of judgment on the verdict after denial of motion for judgment notwithstanding the verdict, although not immediately, as required by Rem. Code, § 431, was proper, the remission of \$2,000 being thereafter entered as a credit on the execution docket; and it was error to vacate it as being entered contrary to instruction. *Fisher v. Schwabacher Hardware Co.*..... 240

2. JUDGMENT (227) — BAR — MATTERS CONCLUDED—GARNISHMENT PROCEEDINGS. A judgment in garnishment proceedings which found that defendant was the holder of certain shares of capital stock of the garnishee, but failed to determine whether or not the garnishee was indebted to the defendant, and granted the garnishee further time to ascertain the state of its accounts with the defendant, is not *res judicata* upon the question of the indebtedness of the defendant to the garnishee. *Oberleitner v. Moore*..... 592

Judicial Notice:

In civil action, see EVIDENCE, 1.

Judicial Sales:

Of property of infant, see GUARDIAN AND WARD, 2.

On foreclosure of mortgage, see MORTGAGES, 8.

Of land for nonpayment of taxes, see TAXATION, 3-6.

Jurisdiction:

Over maritime torts, see ADMIRALTY.

Of adoption proceedings, see ADOPTION.

Appellate jurisdiction in general, see APPEAL AND ERROR, 1.

Of public service commission of action to recover excess freight charges, see CARRIERS, 1.

Criminal prosecutions, see CRIMINAL LAW, 1, 2.

To modify decree of divorce, see DIVORCE, 7.

Validity of exercise of power of eminent domain, see EMINENT DOMAIN, 1, 2.

Appointment of administrator, see EXECUTORS AND ADMINISTRATORS, 1.

To punish for contempt, on violating injunction, see INJUNCTION.

Restraining wrongful exercise of, see PROHIBITION.

Of courts as to injuries to seamen, see SEAMEN.

Jury:

Review of verdicts in civil actions, see APPEAL AND ERROR, 16, 17.

Right to jury of vicinage, see CRIMINAL LAW, 1, 2.

Instructions in criminal prosecutions, see CRIMINAL LAW, 12, 13.

Instructions in civil actions, see TRIAL, 5-8.

1. JURY (4)—RIGHT TO JURY TRIAL—LEGAL OR EQUITABLE ACTION. An action to recover a sum of money, in which the defense was lack of indebtedness because of non-compliance with the contract, is strictly

Jury—Continued.

a law action and triable by a jury. *Harrild v. Spokane School District*..... 266

2. JURY (43)—QUALIFICATIONS—CHALLENGE FOR CAUSE. Error cannot be predicated upon denying a challenge of a juror for cause where the record does not disclose any basis for the challenge and the accused did not exercise all his peremptory challenges. *State v. Lathrop*..... 560

Justices of the Peace:

Conviction in justice court on plea of guilty as former jeopardy, see CRIMINAL LAW, 3, 4.

Justification:

For failure to deliver logs, see SALES, 3.

Landlord and Tenant:

Estoppel of landlord to deny validity of lease, see ESTOPPEL.

Lease of community property, execution by husband alone, see HUSBAND AND WIFE.

Right to rents and profits of mortgaged property, see MORTGAGES, 8.

1. LANDLORD AND TENANT (54)—POSSESSION AND USE—DISTURBANCE BY LANDLORD—DAMAGES—EVIDENCE—SUFFICIENCY. The evidence is insufficient to show damages to the business of plaintiff, a lessee of a portion of a dock, caused by another lessee of a portion thereof by the maintenance of a guarded gate locked at night and on Sundays across the entrance to the dock, or by the laying of an oil pipe line along the edge of the dock so as to interfere with the loading of boats, or damage to merchandise from steam escaping from a pipe extending through its warehouse, where it appears that plaintiff acquiesced therein and was not inconvenienced and suffered no material damage. *Pacific Grocery Co. v. Griffiths & Sons*..... 285
2. LANDLORD AND TENANT (134)—ACTION FOR UNLAWFUL DETAINER—NOTICE TO QUIT—SERVING AND MAILING OF NOTICE. The service of a notice to quit by leaving a copy at the premises with some person of suitable age and discretion is insufficient unless a copy be sent through the mail addressed to the person entitled thereto at his place of residence, as provided by Rem. Code, § 814. *Hinkhouse v. Wacker*..... 253
3. SAME (135)—NOTICE TO QUIT—TIME OF SERVICE. A notice to a tenant to quit and surrender possession of premises at the end of the yearly tenancy is sufficient to support an action for unlawful detainer. *Hinkhouse v. Wacker*..... 253
4. SAME (136)—NOTICE TO QUIT—SUCCESSIVE NOTICES—WAIVER. The giving of an insufficient notice to quit is not a waiver of prior notices. *Hinkhouse v. Wacker*..... 253

Law of the Road:

See HIGHWAYS, 1.

Leases:

See LANDLORD AND TENANT.

Estoppel of landlord to deny validity of lease, see ESTOPPEL.

Legacies:

Taxation of legacies, see TAXATION, 8-11.

Letters:

Secondary evidence of contents, see EVIDENCE, 5.

Levy:

Of taxes, see TAXATION, 1.

Licensee:

Care as to employee of, see SCHOOLS AND SCHOOL DISTRICTS.

Licenses:

For operation of ferries, see FERRIES.

Liens:

For improvements, see EJECTMENT.

Limitation:

Of indebtedness and expenditures of municipality, see MUNICIPAL CORPORATIONS, 18-20.

On cross-examination of witness, see WITNESSES, 1.

Limitation of Actions:

Time for taking appeal or other proceeding for review, see APPEAL AND ERROR, 1, 7.

To set aside tax deed, see TAXATION, 6.

Liquors:

See INTOXICATING LIQUORS.

Loans:

See USURY.

Location:

Of boundary lines, see BOUNDARIES.

Of route for highway, see EMINENT DOMAIN, 4, 6.

Logs and Logging:

Measure of damages for breach of contract to deliver logs, see DAMAGES, 3.

Logs and Logging—Continued.

Judicial notice of price fixed for timber by war industry board, see EVIDENCE, 1.

Breach of contract to deliver logs, see SALES, 3.

Mailing:

Of notice to quit premises, see LANDLORD AND TENANT, 2.

Malpractice:

Damages for aggravation of injury by, see DAMAGES, 1.

Maritime Torts:

Admiralty jurisdiction, see ADMIRALTY.

Marriage:

Promise of as inducing consent of female, see SEDUCTION, 2, 3.

Married Women:

See HUSBAND AND WIFE.

Master and Servant:

Injury to employee in maritime service, see ADMIRALTY.

Liability of municipality for injuries by officers and employees, see MUNICIPAL CORPORATIONS, 14.

Release of liability of master, see RELEASE, 3.

Care as to employee of licensee, see SCHOOLS AND SCHOOL DISTRICTS.

Injuries to seamen, see SEAMEN.

1. MASTER AND SERVANT (20-1) — WORKMEN'S COMPENSATION ACT — RAILROAD EMPLOYEES—STATUTES—CONSTRUCTION. Under Laws of 1917, p. 96, § 19, amending Rem. Code, § 6604-18 by exempting from the operation of the industrial insurance act all employees engaged in maintenance work upon railroads engaged in interstate and intrastate commerce and making no distinction as to whether such work be performed directly or through an independent contractor, a painter employed by an independent contractor painting bridges of a railroad engaged in interstate commerce, is not within the protection of the industrial insurance act, and no award from the insurance fund can be made to his widow upon his death subsequent to the amendment of the act. *Luby v. Industrial Insurance Commission*..... 153
2. MASTER AND SERVANT (31, 155)—INJURY TO SERVANT—NEGLIGENCE—FURNISHING UNSAFE APPLIANCES. The furnishing of gasoline in a kerosene can which was customarily used for kerosene to start a fire in the galley stove of a motor boat, is negligence rendering the owner liable for injuries sustained by a member of the crew through an explosion resulting from its attempted use under circumstances from which he might assume that the contents was kerosene. *Sandanger v. Carlisle Packing Co.*..... 480

Master and Servant—Continued.

3. **MASTER AND SERVANT (147)—INJURY TO SERVANT—CAUSE OF ACCIDENT—EVIDENCE—SUFFICIENCY.** Upon an issue as to whether defendant negligently filled a kerosene can with gasoline as part of the equipment of a motor boat resulting in an explosion, injuring a servant who attempted to start a fire with it, a finding for plaintiff is sustained where there was evidence that the can was filled from appellant's stores on shore shortly before starting on the trip; that the explosion was of great violence and clearly showed that the use of a small quantity of gasoline would generate fumes sufficient to cause such an explosion, while a similar use of kerosene would not do so, there being no suggestion that the contents of the can was other than kerosene or gasoline. *Sandanger v. Carlisle Packing Co.*..... 480

Material Facts:

Certificate to statement of facts, see **APPEAL AND ERROR**, 11.

Measure of Damages:

Harmless error in admission of evidence as to, see **APPEAL AND ERROR**, 24.

For conversion of goods, see **CARRIERS**, 7.

In general, see **DAMAGES**.

Evidence of in action for fraud, see **FRAUD**, 1.

In replevin, see **REPLEVIN**, 1.

Memoranda:

Required by statute of frauds, see **FRAUDS**, **STATUTE OF**, 2-4.

Mental Capacity:

To execute note and mortgage, see **MORTGAGES**, 1.

Milling Privileges:

As constituting discrimination by carrier, see **CARRIERS**, 3, 4.

Misconduct:

Of counsel as harmless error, see **APPEAL AND ERROR**, 22.

Of trial judge, see **CRIMINAL LAW**, 9.

Of counsel ground for reversal in criminal prosecutions, see **CRIMINAL LAW**, 15, 16.

Of counsel or party ground for new trial, see **NEW TRIAL**, 2.

Of jury as ground for new trial, see **TRIAL**, 9, 10.

Misrepresentation:

See **FRAUD**.

Evidence of similar transactions, see **EVIDENCE**, 3.

Models:

Admissibility in evidence, see **EVIDENCE**, 6.

Modification:

- Of decree awarding custody of child, see **DIVORCE**, 2-8.
 Of written contract, see **FRAUDS, STATUTE OF**, 5-7.

Money Received:

- Recovery of price paid for land, see **VENDOR AND PURCHASER**, 2.

Mortgages:

- Of personal property, see **CHATTEL MORTGAGES**.
 Foreclosure of by pledgee of notes, see **PLEDGES**.
1. **MORTGAGES (32)—VALIDITY—MENTAL CAPACITY—EVIDENCE—SUFFICIENCY.** In an action to foreclose a mortgage, a finding of mental capacity to execute the note and mortgage is sustained where it appears that the maker was competent to manage his affairs, although there may have been some impairment of mentality as compared to times when the maker was at his best. *American Savings Bank & Trust Co. v. Peterson*..... 101
 2. **MORTGAGES (67)—CONSTRUCTION AND OPERATION—RECORD OF MORTGAGE AS NOTICE.** A married woman, taking a deed of property covered by a duly recorded mortgage, is bound to take notice of the mortgage and takes subject thereto, even if she had no actual notice and took the property as her separate estate. *Lincoln County State Bank v. Martin* 186
 3. **MORTGAGES (95)—ASSIGNMENTS—PAYMENT TO AND RELEASE BY ASSIGNOR—FAILURE TO RECORD ASSIGNMENT.** Since the enactment of Rem. Code, § 8781, requiring the recording of assignments of mortgages, a *bona fide* purchaser of the property who assumed the mortgage is not bound to take notice of an unrecorded assignment of a mortgage which he had assumed and agreed to pay. *Erickson v. Kendall* 26
 4. **SAME.** Where an assignee of a note and mortgage failed to record the assignment and appointed the mortgagee as her agent to collect the interest and several times authorized the mortgagee to extend the time for payment during a period of nine years, the assignee, as the one of two innocent parties who must suffer, is estopped to assert as against a *bona fide* purchaser of the property that the mortgagee had no right to collect the principal and agree to satisfy the mortgage of record. *Erickson v. Kendall*..... 26
 5. **MORTGAGES (116)—SATISFACTION—PAYMENT OF DEBT.** Mortgage notes that were assigned to a bank as collateral security for the payee's debt to the bank, and thereafter assumed by the purchaser of the mortgage security, are not paid and satisfied until payment of the bank debt for which they were held as collateral, notwithstanding both the original payee and maker were discharged by the transaction. *Lincoln County State Bank v. Martin*..... 186

Mortgages—Continued.

6. SAME (120)—PAYMENT—CHANGE IN FORM OF DEBT. The fact that notes were secured by mortgage collateral and superseded by renewal notes would not change the form of the debt or affect the security. *Lincoln County State Bank v. Martin*..... 186
7. SAME (144)—FORECLOSURE—DEFENSES—WANT OF OR FAILURE OF CONSIDERATION—EVIDENCE—SUFFICIENCY. In an action to foreclose a mortgage given as security for stock purchased in a trust company, want or failure of consideration are not shown from the fact that the concern was in an unprosperous condition, where no representations were made as to the value of the stock, and the purchaser, who was vice president of the concern, had knowledge of the conditions and believed that care and skill would restore its prosperity, and that the stock would prove a profitable investment. *American Savings Bank & Trust Co. v. Peterson*..... 101
8. MORTGAGES (223)—FORECLOSURE—RENTS AND PROFITS—PARTIES ENTITLED. A senior mortgagee, bidding in the property at its own foreclosure sale for the full amount due, is not entitled to rents and profits prior to the time its right of possession accrued, and has no interest in rents collected by a receiver appointed in a prior foreclosure suit by a junior mortgagee who was entitled to collect rents and apply the same to taxes, interest and a deficiency judgment to which the senior mortgagee was not party; and hence cannot have the receiver's appointment vacated on the ground that it was without notice. *Boston & Spokane Realty Co. v. Franc Investment Co.* 113

Motions:

- For new trial, time for taking, see APPEAL AND ERROR, 8.
- For new trial in civil actions, see NEW TRIAL, 1.
- For change of venue in civil actions, see VENUE.

Municipal Corporations:

- Power to condemn property in other state for water supply, see EMINENT DOMAIN, 1, 2.
- 1. MUNICIPAL CORPORATIONS (124)—IMPROVEMENTS—SUBMISSION TO VOTERS—PLAN OR SYSTEM ADOPTED. An ordinance sufficiently complies with Rem. Code, § 8006, in submitting to the voters the plan or system proposed for a public improvement, where it specifies the same in such general terms as will fairly inform the voters of the general nature and extent of the proposed improvement. *Langdon v. Walla Walla* 446
- 2. SAME (154, 181) — IMPROVEMENTS — CONTRACTS — VALIDITY—SUB-
LETTING—VIOLATION OF CHARTER—BREACH OF CONTRACT—RIGHTS AND
LIABILITIES OF PARTIES. A charter provision against the subletting

Municipal Corporations—Continued.

of a city contract without the consent of the city is for the sole benefit of the city and does not invalidate a subcontract as between the parties to it, until the principal contract is terminated by the city for want of consent. *Dyer Brothers Golden West Iron Works v. Pederson* 390

3. MUNICIPAL CORPORATIONS (163)—IMPROVEMENTS—CONTRACTS—SUB-
LETTING—VIOLATION OF CHARTER—RIGHTS AND LIABILITIES OF PARTIES.
A subcontract for part of the work of constructing a bridge, entered
into in violation of a charter provision "that no contract shall be
sublet except for the furnishing of material, without the previous
consent of the city council," is voidable at the election of either
party thereto prior to consent by the city council; and when so
avoided by breach thereof and notice of abandonment of the work
by the subcontractor, all claimed rights of the parties thereunder
as then or thereafter accruing, as in case full performance had been
made, ceased to exist and it could no longer be the basis of an ac-
tion for its breach. *Dyer Brothers Golden West Iron Works v. Ped-
erson* 390
4. SAME (181)—CONTRACT—BREACH—RIGHTS OF PARTIES UNDER VOID-
ABLE CONTRACT. Although such contract was voidable at the election
of either party thereto prior to consent by the city council, and was
unenforceable as an executed contract, nevertheless, it not being
immoral or void for want of consideration, there was created an
enforceable legal obligation in favor of the subcontractor for serv-
ices rendered thereunder up until the time of his abandonment of
the work, the value of which will be measured by the terms of the
contract; and it appearing that the subcontract was half completed
at the time of its abandonment and that the contractor had paid
thereon more than half the total contract price, such payment con-
stituted a complete satisfaction of the obligation arising in favor of
the subcontractor and he could recover nothing more under the con-
tract. *Dyer Brothers Golden West Iron Works v. Pederson*..... 390
5. SAME (241)—ASSESSMENTS—SPECULATIVE OR INTENDED BENEFITS.
The eminent domain commissioners in fixing the amount of assess-
ments or determining the question of benefits to property from a
local improvement should take into consideration the present as
well as the future use to which the property is reasonably adapt-
able, yet the benefit must be a present one and immediately accru-
ing from the improvement in question, and landowners cannot be
assessed for speculative or intended benefits which may never be
realized. *In re West Marginal Way, Seattle*..... 418
6. SAME (241, 267-2)—ASSESSMENTS—BENEFITS—REMOTE OR SPECU-
LATIVE BENEFITS—EVIDENCE—SUFFICIENCY. An assessment on prop-

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erty for benefits from a proposed street is invalid as resting upon a fundamentally wrong basis, where the property, located on an island, is separated from the proposed street by a navigable waterway subject to the control of the Federal government and by privately owned property abutting thereon, and the street can only be reached by a bridge constructed over the waterway at large expense and then on through the privately owned property the plans for which are not contemplated at the present time, nor any assurance of such in the reasonably near future. *In re West Marginal Way, Seattle*..... 418

7. MUNICIPAL CORPORATIONS (267-1)—IMPROVEMENTS—ASSESSMENTS—BENEFITS—REVIEW. The report of eminent domain commissioners as to benefits to property from the establishment of a street, fortified by the findings and judgment of the trial court in confirmation thereof, will not be disturbed unless the evidence so clearly preponderates as to indicate arbitrariness and manifest oppression. *In re West Marginal Way, Seattle*..... 418
8. SAME (267-3)—ASSESSMENTS—REVIEW—ARBITRARY ACTION. While ordinarily the question of benefits to property from a public improvement is one of fact, the finding of which by the eminent domain commissioners will not be disturbed except for arbitrariness or manifest abuse, yet when it is obvious from the physical condition of the property, its locality, environment and character of the improvement, that an assessment should not be laid upon the property for the purpose, and that to do so would amount to an exaction from the property owner which he should not be obliged to make as a special assessment, the courts will interfere to prevent a consummation of the injustice. *In re West Marginal Way, Seattle*. 418
9. MUNICIPAL CORPORATIONS (336)—VIOLATION OF HEALTH ORDINANCE—COMPLAINT—SUFFICIENCY. A complaint charging that defendant violated an ordinance providing that it "shall be unlawful for any person to refuse, fail or neglect to comply with any legal order of the health officer," by alleging that he "did wilfully and unlawfully refuse, fail and neglect to comply with the legal order of the health officer . . . in that he permitted people to congregate at his place of business and play cards," is sufficient to charge a misdemeanor. *Roslyn v. Pavlinovich*..... 306
10. MUNICIPAL CORPORATIONS (380, 384, 390)—USE OF STREETS—COLLISION AT CROSSING—FAILURE TO SOUND HORN—PROXIMATE CAUSE—QUESTION FOR JURY. In an action by a passenger in an automobile in collision with defendant's automobile at a street intersection, although the failure of defendant to sound his horn would not have prevented the collision in view of the knowledge of plaintiff's driver

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- of the approach of defendant's car, yet it was for the jury to say whether or not such failure of defendant to sound his horn was the proximate or contributing cause of plaintiff's injury, where plaintiff did not see or know of the approach of defendant until the instant of the collision; since the court cannot say, as a matter of law, that a timely warning might not have enabled plaintiff to prevent, or at least lessened, her injury. *Carlisle v. Hargreaves*. 383
11. SAME (383)—CONTRIBUTORY NEGLIGENCE—USE OF STREET BETWEEN INTERSECTIONS. While the use of streets by pedestrians between intersections is, by ordinance, a right inferior to vehicles and exacts a higher degree of care, such use is not contributory negligence, in the absence of proof of conduct to relieve defendant of negligence as the proximate cause of the injury. *Collins v. Nelson*..... 71
12. MUNICIPAL CORPORATIONS (384, 389)—USE OF STREETS—NEGLIGENCE—PROXIMATE CAUSE—EVIDENCE—SUFFICIENCY. The evidence sustains findings of the trial court that defendant's negligence was the proximate cause of a collision between his automobile and plaintiff, where it appears that plaintiff, in crossing the street between intersections, threw up his hand as a signal to defendant and immediately walked in a diagonal direction across the street, that the street was clear of other traffic, but that defendant, though having opportunity to pass safely behind him, veered his car to the left side of the street and struck plaintiff with the hub of his right front wheel. *Collins v. Nelson* 71
13. MUNICIPAL CORPORATIONS (384, 392) — STREETS—COLLISION WITH AUTOMOBILE—PROXIMATE CAUSE—INSTRUCTIONS. In an action for injuries sustained by a bicyclist struck by an automobile, a requested instruction that violation of an ordinance in making a turn was the proximate cause of the injury, even though no headlight was burning on the bicycle, is properly refused, it being for the jury to determine whether failure to carry a light was the proximate cause. *Moltor v. Blackwell Motor Co.*..... 279
14. MUNICIPAL CORPORATIONS (407)—GOVERNMENTAL FUNCTIONS—TORTS OF OFFICERS—HEALTH QUARANTINE—LIABILITY. A city is not liable for the fraudulent acts of its police officers and board of health in a wrongful and malicious conspiracy to charge and imprison a person as having an infectious disease, since it is but performing a governmental function in enforcing quarantine regulations in the interest of public health. *Franklin v. Seattle*..... 671
15. SAME (423)—STREETS—DUTY OF CITY. A city is only required to use reasonable care to keep its streets in a reasonably safe condition for travel. *Thompson v. Bellingham*..... 583

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16. SAME (437)—STREETS—DEFECTS—UNUSUAL DANGERS—BARRIERS. A city is not liable for failure to place barriers where they were forbidden by the public service commission. *Thompson v. Bellingham* 583
17. MUNICIPAL CORPORATIONS (444, 470)—STREETS—DEFECTS—ASSUMPTION OF RISKS—CHOICE OF WAYS—INSTRUCTIONS. One who is familiar with the locality and knows the danger of turning off a street leading to a bridge on an unguarded railroad trestle assumes the risk where he voluntarily chose that way in an unusual condition of foggy weather, if prudence and care requires him to avoid it by another convenient and safe way. *Thompson v. Bellingham*.... 583
18. SAME (486, 519)—BONDS—LIMITATION OF INDEBTEDNESS—CONSTITUTIONAL PROVISIONS. The issuance of bonds in the sum of \$500,000, for the making of extensions and betterments to a city's water works system does not increase the city's total indebtedness beyond the ten per cent of the taxable property in such city, as allowed by Const., art. 8, § 6, for all city purposes, where the assessed valuation of the taxable property within the city is \$9,982,955, and its present indebtedness amounts to only \$390,457. *Langdon v. Walla Walla* 446
19. SAME. Such \$500,000 indebtedness is not limited to the five per cent limitation of indebtedness allowed for supplying the city "with water, artificial light and sewers," but is valid if the total indebtedness of the city is not increased thereby to more than ten per cent of the taxable property, as provided by Const., art. 8, § 6, for all city purposes. *Langdon v. Walla Walla*..... 446
20. SAME. Under Const., art. 8, § 6, allowing a city to become indebted in an amount not exceeding five per cent of the taxable property in such city, for the purpose of supplying the city "with water, artificial light and sewers," a city may exhaust such debt-incurring power in supplying the city with water alone; since the language enumerating the purposes will be regarded as reading in the disjunctive, as though it were "water, artificial light or sewers." *Langdon v. Walla Walla* 446
21. SAME (523)—BONDS—ISSUANCE—SUBMISSION TO VOTERS—RATIFICATION OF PLAN. An election submitting to the voters of a city a proposed improvement and the issuance of bonds therefor, concluding with the words, "and shall the ordinance be ratified" is not invalid as amounting to the ratification of the ordinance rather than a ratification of the proposition submitted, since the manifest intent expressed by the ordinance and ballot was that the ordinance should be deemed in full force and effect, in so far as it provided for the submission of the proposition. *Langdon v. Walla Walla*. 446

Municipal Corporations—Continued.**22. SAME (523)—BONDS—SUBMISSION TO VOTERS—SEPARATE PURPOSES.**

An election submitting to the voters the proposition of making betterments and extensions to the city's water works system which includes the construction of a large reservoir in addition to the extensions, additions, pipe lines, etc., is not invalid as submitting other than a single proposition to the voters, since the things proposed to be done all relate to the improvement of the system as a whole. *Langdon v. Walla Walla*..... 446

23. SAME (524)—SUBMISSION TO VOTERS—NOTICE OF ELECTION—PUBLICATION. Rem. Code, § 7670-22, providing that none but emergent ordinances shall go into effect before thirty days from the time of final passage, and granting the right of referendum during such period, does not prevent the going into effect, upon its passage and publication, of an ordinance submitting to the voters a proposition of making betterments and extensions to the city's water works system, thereby, in effect, providing within itself for a referendum; hence the publication of the election notice less than thirty days following the passage of the ordinance was not premature. *Langdon v. Walla Walla*..... 446

24. MUNICIPAL CORPORATIONS (525)—PUBLIC UTILITIES—BONDS—SALE AT DISCOUNT—STATUTES. In an action to enjoin the issuance and sale of municipal bonds for a public improvement, the mere allegation in the complaint that the city authorities are threatening to sell "a part only of said bonds at par, and a part thereof at 95 cents on the dollar," in violation of a provision of the ordinance that "none of said bonds shall be sold or issue . . . at less than par value and accrued interest," does not warrant the court in interfering; since it will be presumed that the city authorities are not contemplating selling any of the bonds at such a discount below par that the total amount of such discount and interest will result in paying more than the maximum rate allowed by the statutes and ordinance. *Langdon v. Walla Walla*..... 446

Murder:

See HOMICIDE.

Navigable Waters:

Bodies and streams of water not capable of navigation, see WATERS AND WATER COURSES.

Necessity:

For statement of facts on appeal, see APPEAL AND ERROR, 12.

For condemnation of property for public use, see EMINENT DOMAIN.
3, 4.

Negligence:

- Liability of county for torts or negligence of officers or agents, see COUNTIES, 1.
- Damages in general, see DAMAGES, 1, 4-9.
- In use of highway, see HIGHWAYS.
- Defects or obstructions in highways, see HIGHWAYS, 3, 4.
- Of employers, see MASTER AND SERVANT.
- Causing injuries to persons using streets, see MUNICIPAL CORPORATIONS, 10-13, 15-17.
- Injuries from defects in streets, see MUNICIPAL CORPORATIONS, 15-17.
- Fire caused by operation of railroad, see RAILROADS.
- Care as to employee of licensee, see SCHOOLS AND SCHOOL DISTRICTS.
- Causing injuries to seamen, see SEAMEN.
- In operation of street railroads, see STREET RAILROADS.

Negotiable Instruments:

- See BILLS AND NOTES.
- Bills of lading, see CARRIERS, 5-8.

New Trial:

- Effect of motion for new trial on time to appeal, see APPEAL AND ERROR, 7, 8.
- Review of discretionary ruling on motion, see APPEAL AND ERROR, 15.
- Conduct of jury as ground for, see TRIAL, 9, 10.
- 1. NEW TRIAL (5) — SUCCESSIVE APPLICATIONS — POWERS OF COURT. The court has no jurisdiction, after the denial of a motion for new trial and the proper entry of judgment in the case, to again consider a like motion, based upon the same grounds, and make another order in the case. *Rogers v. Savage*..... 246
- 2. NEW TRIAL (10)—GROUNDS—MISCONDUCT OF PARTIES—EXAMINATION OF WITNESSES. In an action on an account in which defendants claimed a novation agreement whereby purchasers of their mill assumed the account and they were released, and in which some question was raised as to the manner in which defendants had become possessed of the bill of sale, the natural inference being that it never had been delivered to the purchasers, it was not error to refuse plaintiffs' motion for new trial on the ground of prejudice in allowing a witness to refer to a mortgage foreclosure by plaintiffs against defendants concerning the property described in the bill of sale; since the evidence was a part of the proofs in explanation of defendants' possession of the bill of sale, and no prejudice resulted to plaintiffs. *Seal v. Long*..... 370
- 3. NEW TRIAL (37)—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE. The refusal to grant a new trial on the ground of newly

New Trial—Continued.

discovered evidence will not be disturbed, where the affidavits in support of the motion showed merely a corroboration of the matters testified to by appellant's witnesses, and the court is satisfied that there was no abuse by the court in the exercise of its discretion.

Molitor v. Blackwell Motor Co...... 279

4. **NEW TRIAL (56)—EXCESSIVE VERDICT—REDUCTION OF EXCESS.** The trial court, on motion for new trial, has power to refuse to grant the same on condition that plaintiff will voluntarily remit a portion of the verdict in his favor. *Yarrough v. Hines*..... 310

Next of Kin:

Right to nominate administrator, see **EXECUTORS AND ADMINISTRATORS**, 2.

Nomination:

Of administrator by person entitled, see **EXECUTORS AND ADMINISTRATORS**, 2.

Nonresident:

Appointment of as administrator, see **EXECUTORS AND ADMINISTRATORS**, 1.

Notice:

Of appeal from decree settling account of administrator, see **APPEAL AND ERROR**, 1.

Parties entitled to notice of appeal, see **APPEAL AND ERROR**, 5, 6, 9.

Judicial notice, see **EVIDENCE**, 1.

Defects or obstruction in highways, as affecting liability for negligence, see **HIGHWAYS**, 3.

To deliver possession of leased premises, see **LANDLORD AND TENANT**, 2-4.

Record of mortgage as notice, see **MORTGAGES**, 2.

Affecting *bona fides* of mortgagee, see **MORTGAGES**, 3, 4.

Election on issuance of bonds, see **MUNICIPAL CORPORATIONS**, 23.

Defects in goods sold under warranty, see **SALES**, 9, 10.

Sale for taxes, see **TAXATION**, 4.

Novation:

Evidence admissible to show novation, see **ACCOUNT, ACTION ON**.

Validity of agreement as affected by statute of frauds, see **FRAUDS, STATUTE OF**, 1.

1. **NOVATION (7)—EVIDENCE—ADMISSIBILITY.** In an action on an account in which defendants claimed a novation agreement whereby purchasers of their mill assumed the account and they were released, the written bill of sale given by defendants to the purchasers

Novation—Continued.

is the best evidence of the transfer of the property and was admissible for that purpose, and not objectionable as failing to show release of the original debtors, or to sustain the defense of novation, or as not conforming to the novation agreement as alleged in defendants' answer. *Seal v. Long*..... 370

Nuisance:

1. NUISANCE (19)—OPERATION OF SLAUGHTER HOUSE—ABATEMENT—EVIDENCE—SUFFICIENCY. A nuisance in the operation of a slaughter house and fertilizing plant warranting its abatement is sufficiently shown where it appears that foul odors were emitted which spread over the adjoining property, causing discomfort and nausea to persons residing there, that it could not be operated without the emission of odors in some degree, and that its operation interfered with the comfort and health of the residents and greatly depreciated the value of all property in the vicinity by rendering it unfit for small suburban homes for which it is most suitable. *Grant v. Rosenberg* 361
2. SAME (23)—OPERATION OF SLAUGHTER HOUSE—ABATEMENT. The fact that the business of conducting a slaughter house and fertilizing plant is a lawful one, and that it cannot be carried on without the emission of odors in some degree, thereby necessitating an abandonment of the business itself if abated as a nuisance, is not a valid objection, since the business may lawfully be conducted at any place where similar businesses are conducted, or upon property large enough to confine the objectionable odors thereto, and where not interfering with the use or enjoyment of other property or destroying its value; but such business may not be conducted at any or all places merely because it is lawful. *Grant v. Rosenberg*..... 361
3. SAME (23)—INJUNCTION—RELIEF AWARDED—SUPPRESSION OF BUSINESS. Though a court of equity will not usually enjoin the operation of a legitimate business carried on at a proper place, because of the manner of its operation, but will first require the cause of the grievance to be corrected, it will abate the operation of a slaughter house and fertilizing plant located in a residential district where it must necessarily cause injury to adjoining property owners, it being impossible to operate such plant without the emission of odors therefrom. *Grant v. Rosenberg*..... 361
4. NUISANCE (23)—SLAUGHTER HOUSE—REMEDIES—DECREE. Where the operation of a slaughter house and fertilizing plant has been enjoined as a nuisance, by reason of noxious odors arising therefrom, and evidence has been introduced to show that appliances could be obtained to eliminate these odors, which arose from the fertilizing

Nuisance—Continued.

plant and not from the slaughter house, it follows that before an order might issue to destroy the plant, a reasonable time and opportunity should be given to obviate the noxious odors. *Grant v. Rosenberg* 361

Objections:

Review as dependent on objection made on trial, see **APPEAL AND ERROR**, 2.

Necessity of rulings on objections for purposes of review, see **CRIMINAL LAW**, 14.

Obstructions:

Of flow of surface waters, see **WATERS AND WATER COURSES**, 1, 2.

Offer of Proof:

See **TRIAL**, 1.

Officers:

Liability for torts of county officers, see **COUNTIES**, 1.

Liability of municipality for torts of officers, see **MUNICIPAL CORPORATIONS**, 14.

Powers of officers of irrigation district, see **WATERS AND WATER COURSES**, 5.

Opinion Evidence:

In criminal prosecution, see **CRIMINAL LAW**, 8.

In civil actions, see **EVIDENCE**, 9.

Option:

Optional use of fixtures in building, see **CONTRACTS**, 1, 2.

Oral Agreements:

To modify written contracts, see **FRAUDS, STATUTE OF**, 5-7.

Oral Contracts:

See **FRAUDS, STATUTE OF**.

Oral Evidence:

To show intent of writings, see **EVIDENCE**, 8.

Order of Proof:

Review of discretion of trial judge, see **APPEAL AND ERROR**, 14.

Ordinances:

Municipal ordinances, see **MUNICIPAL CORPORATIONS**, 1, 9.

Submitting proposed acquisition of water works to vote of people, see **MUNICIPAL CORPORATIONS**, 21, 23, 24.

Overcharge:

Recovery of by shipper, see **CARRIERS**, 1, 2.

Overt Act:

Violation of liquor laws, see **INTOXICATING LIQUORS**, 1.

Ownership:

Of deposits for collection, see **BANKS AND BANKING**, 4.

Parent and Child:

Adoption of children, see **ADOPTION**.

Custody and support of children on divorce, see **DIVORCE**.

Parent as guardian of child's estate, see **GUARDIAN AND WARD**.

Parol Evidence:

To show intent of writings, see **EVIDENCE**, 8.

To show essentials of memorandum of sale, see **FRAUDS, STATUTE OF**, 4.

Parties:

On appeal or writ of error, see **APPEAL AND ERROR**, 5, 6, 9.

Entitled to allege error, see **APPEAL AND ERROR**, 13.

Rights and liabilities as to costs, see **COSTS**.

For compensation for property taken for public use, see **EMINENT DOMAIN**, 5.

Right to rents and profits of mortgaged property, see **MORTGAGES**, 8.

Rights of under voidable contract for improvement, see **MUNICIPAL CORPORATIONS**, 2-4.

Misconduct ground for new trial, see **NEW TRIAL**, 2.

Participation and relation, see **SALES**, 2.

Partnership:

1. **PARTNERSHIP (5, 18)—CREATION OF RELATION—AGREEMENT WITH MEMBER OF FIRM.** The voluntary consent of all members being required to form a partnership, a third person cannot become a member thereof without concurrence of all members of the firm. *Beebe v. Allison*..... 145
2. **SAME (8)—CREATION OF RELATION—ESTOPPEL—DECLARATIONS OF PARTY.** Declarations made by a person under the belief that he was a member of a partnership do not constitute him a partner by estoppel or otherwise as to the rights of third persons, it not being shown that credit was extended upon the faith of his being a member of the firm. *Beebe v. Allison*..... 145
3. **PARTNERSHIP (36)—LIABILITY—SALES—DELIVERY.** In an action against a partnership for goods ordered by a member of the firm, there was not sufficient evidence of delivery to the partnership to sustain its liability, where the partnership was dissolved before de-

Partnership—Continued.

livery and the goods were delivered to a corporation which succeeded to the business and receipt was taken therefor from the corporation and later a claim was filed against the corporation on its becoming insolvent. *Child, Day & Churchill v. Linfield*..... 638

4. **PARTNERSHIP (92)—RECEIVERS—GROUNDS FOR APPOINTMENT.** The court will appoint a receiver for partnership property where an action for dissolution has been commenced, and the evidence shows a lack of harmony between the parties and that plaintiff, who had possession of the property, had converted portions thereof to his own use and was disposed to dissipate the property, and had advised creditors to bring actions to enforce collection of their claims. *Duley v. Duley*..... 183

Payment:

See **COMPROMISE AND SETTLEMENT**.

Compensation under contract, see **CONTRACTS**, 1, 2.

Of mortgage, see **MORTGAGES**, 3-6.

Compensation to contractor for public improvements, see **MUNICIPAL CORPORATIONS**, 4.

Price of goods sold, see **SALES**, 4.

Subrogation on payment, see **SUBROGATION**.

Irrigation district bonds, place of payment, see **WATERS AND WATER COURSES**, 7, 8.

Of debts under terms of will, see **WILLS**, 4.

Performance:

Or breach of contract, see **CONTRACTS**.

Personal Injuries:

See **ASSAULT**.

Aggravation of injury through malpractice of physician, see **DAMAGES**, 1.

Inadequate and excessive damages, see **DAMAGES**, 4-8.

From negligence in use of highway, see **HIGHWAYS**.

To employee or third person, see **MASTER AND SERVANT**.

To person on city street, see **MUNICIPAL CORPORATIONS**, 10-13, 15-17.

Release of claim for damages, see **RELEASE**, 3.

To employee of licensee, in use of elevator in school building, see **SCHOOLS AND SCHOOL DISTRICTS**.

To seamen, see **SEAMEN**.

To persons on or near street railroad tracks, see **STREET RAILROADS**.

Pests:

Creation of pest districts, see **AGRICULTURE**.

Creation of pest districts as exercise of police power, see **CONSTITUTIONAL LAW**.

Physicians and Surgeons:

Aggravation of injury through malpractice, see DAMAGES, 1.

Place:

Criminal jurisdiction as dependent on locality of offense, see CRIMINAL LAW, 2, 3.

Of payment of irrigation district bonds, see WATERS AND WATER COURSES, 7, 8.

Pleading:

Sufficiency of complaint charging assault, see ASSAULT.

Complaint charging violation of health ordinance, see MUNICIPAL CORPORATIONS, 9.

Amendment of complaint to show venue of action, see VENUE, 2.

1. PLEADING (6)—CONCLUSIONS FROM FACTS ALLEGED. In an action to recover a balance due upon a construction contract, an allegation in the affirmative answer that plaintiff "forfeited any right to compensation" is but a conclusion that, in the light of preceding allegations, defendants' damages caused by plaintiff's neglect of the work exceeded the amount of plaintiff's claim, and was not the pleading of a technical forfeiture. *Pearson v. Gottstein Investment Co.*..... 60
2. PLEADING (42)—ANSWER—INCONSISTENT DEFENSES. General denial of a fraudulent conspiracy is not inconsistent with an affirmative defense of a release of damages. *Betcher v. Kunz*..... 563
3. PLEADING (59-1) — ANSWER — MATTER AVAILABLE UNDER GENERAL DENIAL. In an action to recover the price of automobile tires, proof of an agreement between defendants and plaintiff's agent that the tires were to be left with defendants in storage for use of the trade in that part of the city was not the proving of an affirmative defense necessary to be pleaded as such, the only purpose being to show that the alleged sale contracts were never made. *Howatt v. Clark*.... 137
4. PLEADING (173)—ISSUES, PROOF AND VARIANCE—EVIDENCE ADMISSIBLE UNDER GENERAL DENIAL. In an action for breach of contract to deliver box shooks, a letter tending to show that the original draft of the contract had been accepted by neither of the parties is admissible under a general denial. *Empson Packing Co. v. Lamb-Davis Lumber Co.*..... 75

Pledges:

See CHATTEL MORTGAGES.

1. PLEDGES (15) — ACTION TO ENFORCE RIGHT OF ACTION PLEDGED. Where mortgage notes are assigned to a bank as collateral security for a note due the bank, the bank may maintain an action to foreclose the mortgage for the amount due on the bank note. *Lincoln County State Bank v. Martin*..... 186

Police Power:

Of state, see CONSTITUTIONAL LAW.

Policy:

Of insurance, see INSURANCE.

Possession:

See ADVERSE POSSESSION.

Defects in chattel mortgage cured by taking possession, see CHATTEL MORTGAGES, 4.

Of liquor with intent to sell, see INTOXICATING LIQUORS.

Of demised premises, see LANDLORD AND TENANT, 1.

Powers:

Of court to consider second motion for new trial, see NEW TRIAL, 1.

Of board to correct excessive tax, see TAXATION, 2.

Of officers of irrigation district, see WATERS AND WATER COURSES, 5.

Construction of, see WILLS, 4.

Practice:

See APPEAL AND ERROR; COSTS; CRIMINAL LAW; DIVORCE; JURY; NEW TRIAL; PLEADING; VENUE.

Prejudice:

Ground for reversal in civil actions, see APPEAL AND ERROR, 21-29.

Ground for reversal in criminal prosecution, see CRIMINAL LAW, 15, 16.

Of judge as ground for change of venue, see VENUE, 1.

Presentment:

Of claim against county, see COUNTIES, 2, 3.

Presumptions:

As to regularity of findings, see APPEAL AND ERROR, 18.

Chastity of female, see SEDUCTION, 4, 6.

Previous Chaste Character:

Of female, see SEDUCTION, 4, 6.

Price:

Action for price of goods, see SALES, 5, 11.

Vacation of tax sale for inadequate price, see TAXATION, 3.

Recovery by purchaser on failure of title, see VENDOR AND PURCHASER, 2.

Principal and Agent:

Liability of county for torts of agent, see COUNTIES, 1.

Principal and Surety:

Indemnity insurance, see **INSURANCE**.

Subrogation of sureties, see **SUBROGATION**.

Privilege:

Exclusive nature of to operate ferry, see **FERRIES**.

Probate Court:

Review of decisions of, see **APPEAL AND ERROR**, 1.

Process:

Notice of proceedings for judgment for delinquent taxes, see **TAXATION**, 4.

Profits:

Right to rents and profits of mortgaged property, see **MORTGAGES**, 8.

Prohibition:

1. **PROHIBITION (9, 20)—WHEN LIES—JURISDICTION—PREVENTING FURTHER PROCEEDINGS—INJUNCTION.** Since, under Rem. Code, §§ 1027 1028, a writ of prohibition will not issue unless the trial court is proceeding without or in excess of jurisdiction, and then only where there is no adequate remedy either by appeal or by writ of error, the supreme court will not grant the writ to prohibit the superior court from hearing a motion to vacate a temporary injunction, though entered by consent of defendant and under circumstances that estop it from having it dissolved; since the court, having jurisdiction of the subject-matter and the parties, had jurisdiction to make an order in the premises, which order, if not appealable, is reviewable by certiorari. *State ex rel. McGlothorn v. Superior Court*..... 501

Promise of Marriage:

Inducing consent of female, see **SEDUCTION**, 2, 3.

Proof:

Of effort to secure primary evidence, see **EVIDENCE**, 4.

Of loss insured against, see **INSURANCE**.

Offer of at trial of civil action, see **TRIAL**, 1.

Property:

Subject to mortgage, see **CHATTEL MORTGAGES**, 1.

Property included in mortgage, see **CHATTEL MORTGAGES**, 2.

Taking for public use, see **EMINENT DOMAIN**.

Recovery of property detained, see **REPLEVIN**.

Prosecuting Attorneys:

Opening statement as harmless error, see **CRIMINAL LAW**, 11.

Proximate Cause:

Of collision in city street, see MUNICIPAL CORPORATIONS, 10, 12, 13.

Publication:

Of notice of election for issuance of city bonds, see MUNICIPAL CORPORATIONS, 23.

Service of process in tax foreclosure proceedings, see TAXATION, 4.

Public Debt:

See MUNICIPAL CORPORATIONS, 18-24.

Public Improvements:

By cities, see MUNICIPAL CORPORATIONS, 1-8.

Public Service Commission:

Proceedings for refund of excess freight charges, see CARRIERS, 1, 2.

Public Use:

Taking property for public use, see EMINENT DOMAIN.

Public Utility:

Sale of bonds for, see MUNICIPAL CORPORATIONS, 24.

Punishment:

Contempt of court, see CONTEMPT.

Cruel or unusual punishment, see CRIMINAL LAW, 17.

Quarantine:

Liability for acts of officers in enforcing health quarantine, see MUNICIPAL CORPORATIONS, 14.

Question For Jury:

In action for injury to pedestrian struck by auto, see HIGHWAYS, 2.

Failure to sound horn as proximate cause of injury, see MUNICIPAL CORPORATIONS, 10.

Origin of fire, see RAILROADS.

Implied warranty on sale of goods, see SALES, 8.

Contributory negligence of person injured by street car, see STREET RAILROADS, 2-4.

Quotient Verdict:

In general, see TRIAL, 10.

Railroads:

Carriage of goods and passengers, see CARRIERS.

Exemption of employees from workmen's compensation act, see MASTER AND SERVANT, 1.

Railroads in city streets, see STREET RAILROADS.

Railroads—Continued.

1. RAILROADS (110)—FIRES—CAUSE OF FIRE—QUESTION FOR JURY. In an action by one timber company against another for damages from fire started through negligent operation of defendant's logging engine, the question of the origin of the fire is for the jury, where evidence showed threats made by members of the I. W. W. if the logging camps were started, that the fire started on the day defendant resumed operations, the presence of the men making the threats, the fact that a stranger was seen apparently in the act of starting a fire, and that strange men were seen running from the place where the fire started. *Sound Timber Co. v. Danaher Lumber Co.* 314

Rate:

For carriage of freight, see CARRIERS, 3, 4.

Ratification:

By landlord of invalid lease, see ESTOPPEL.

Of proposed improvement and issuance of bonds, see MUNICIPAL CORPORATIONS, 21.

Real Property:

Adverse possession, see ADVERSE POSSESSION.

Rights of aliens, see ALIENS.

Property conveyed by deed, see DEEDS.

Implied easements, see EASEMENTS.

Contracts for conveyance, see VENDOR AND PURCHASER.

Rebuttal:

Evidence, see TRIAL, 3.

Receivers:

As parties on appeal, see APPEAL AND ERROR, 5, 6, 9.

In foreclosure proceedings, see MORTGAGES, 8.

For partnership property, see PARTNERSHIP, 4.

Records:

Transcript on appeal or writ of error, see APPEAL AND ERROR, 11, 12.

Chattel mortgage, see CHATTEL MORTGAGES, 3, 4.

Of mortgages in general, see MORTGAGES, 2-4.

Reduction:

Of excessive verdict on denial of new trial, see NEW TRIAL, 4.

Of excessive tax, see TAXATION, 2, 7.

Refund:

To shipper of excess freight charges, see CARRIERS, 1, 2.

Regulation:

Of freight rates, see CARRIERS, 3, 4.

Rehearing:

See NEW TRIAL.

Release:

Discharge by compromise or settlement, see COMPROMISE AND SETTLEMENT.

Parol evidence to vary writing, see EVIDENCE, 8.

1. RELEASE (6)—OPERATION AND EFFECT—JOINT TORT FEASORS. The acceptance of a sum of money from one joint tort feisor in satisfaction of a claim for damages and the execution of a release therefor operates as a release of the other joint tort feisor. *Betcher v. Kunz*..... 563
2. SAME (6)—OPERATION AND EFFECT—EVIDENCE. A release of damages from the sale of a certain block of stock reciting that it releases the seller from any and all further pecuniary liability for or on account of the sale of any of the stock of the company covers a conspiracy in the sale of other stock, and is not confined to the particular stock sold. *Betcher v. Kunz*..... 563
3. RELEASE (8)—VALIDITY—FRAUD—EVIDENCE—SUFFICIENCY. Under the rule that evidence of fraud must be clear and convincing, a release of damages is not shown to have been fraudulently obtained by statements of doctors that plaintiff's foot would be all right and as good as ever in thirty to sixty days, where the settlement was made at plaintiff's solicitation and upon his own terms, he afterwards worked again for defendant for eight months in the same capacity as at the time of his injury, and waited more than a year after the settlement before bringing an action for damages, and there was no evidence of bad faith on the part of the doctors, who were disinterested and gave mere expressions of opinion and not a guarantee. *Cortez v. Spokane International R. Co.*..... 289
4. RELEASE (8)—VALIDITY—FRAUD—EVIDENCE—SUFFICIENCY. A release of damages should not be set aside for fraud where the parties dealt at arm's length, were represented by counsel, and there was no overreaching. *Betcher v. Kunz*..... 563

Removal:

Of guardian of estate of child, see GUARDIAN AND WARD, 1.

Removal of Causes:

Change of venue or place of trial, see VENUE.

Rent:

Right of purchaser at mortgage foreclosure sale to rents and profits of property, see MORTGAGES, 8.

Reopening Case:

For further evidence, see TRIAL, 4.

Replevin:

1. REPLEVIN (36)—VALUE OF USE OF PROPERTY DETAINED—MEASURE OF DAMAGES. Upon replevin for a team of horses, defendant, who was deprived of possession by the writ is entitled to judgment for the value of the use of the team during the pendency of the action. *Esmond v. Richards*..... 641
2. SAME (44)—JUDGMENT—FORM. In replevin for a team of horses, in which it was admitted that defendant was liable for a balance of \$150, a judgment for defendant for a return of the team, or in the alternative, for its value, will not be construed as denying plaintiff the right to the offset. *Esmond v. Richards*..... 641
3. REPLEVIN (47) — VALUE OF PROPERTY — ALTERNATIVE JUDGMENT — AMOUNT. In replevin for a team of horses, defendant, who was deprived of possession by the writ, is not bound by the value alleged in the plaintiff's complaint, or limited to that sum upon a successful defense of the suit. *Esmond v. Richards*..... 641

Requests:

For instructions in civil actions, see TRIAL, 7, 8.

Res Gestae:

In criminal prosecutions, see CRIMINAL LAW, 5, 6.

Res Judicata:

See JUDGMENT, 2.

Retrospective Laws:

See COUNTIES.

Revenue:

See TAXATION.

Review:

See HABEAS CORPUS.

In civil action, see APPEAL AND ERROR.

In criminal prosecution, see CRIMINAL LAW, 14-16.

Roads:

Streets in cities, see MUNICIPAL CORPORATIONS, 6, 7, 10-13, 15-17.

Sales:

Harmless error in admission of evidence in action for breach of contract to deliver logs, see APPEAL AND ERROR, 23.

Of stock as relieving stockholder from liability for debts of bank, see BANKS AND BANKING, 1.

Reliance on false representations inducing sale, see FRAUD.

Requirements of statute of frauds, see FRAUDS, STATUTE OF, 2-4.

Of property of infant under order of court, see GUARDIAN AND WARD, 2.

Sales—Continued.

Of intoxicating liquors, see INTOXICATING LIQUORS.

Foreclosure sale, see MORTGAGES, 8.

Of municipal bonds, see MUNICIPAL CORPORATIONS, 24.

Evidence of delivery of goods to firm, see PARTNERSHIP, 3.

Tax sales, see TAXATION, 3-6.

Of real property, see VENDOR AND PURCHASER.

1. **SALES (1)—CONTRACT—EXECUTION—SIGNATURE OF PARTIES.** A contract for the sale of box shooks was incomplete and not enforceable between the parties, where the original draft of the contract was reduced to writing and signed by one of the parties and forwarded to the other, which other, before signing, made changes therein and returned it, and the first party, though accepting the changes, made other changes and insisted upon a contract without interlineations and erasures, and after still other changes, it was agreed that a contract containing the terms upon which the parties had agreed should be signed by the presidents of the respective companies, which was never done. *Empson Packing Co. v. Lamb-Davis Lumber Co.*..... 75
2. **SALES (6) — REQUISITES AND VALIDITY — PARTIES — PARTICIPATION AND RELATION.** An implied contract of purchase of automobile tires does not arise from the fact that defendants, under an agreement with plaintiff's agent, allowed him to deliver and leave the tires in storage with them with the privilege of sale and right to commissions on sales made by the agent to their customers as compensation for storage and services rendered, although the tires were billed to them in form indicating intended sales, and some of them were billed out to plaintiff's customers in form as sales from defendants, where defendants never assumed to deal with the tires as their own. *Howatt v. Clark.*..... 137
3. **SALES (77)—FAILURE TO DELIVER—JUSTIFICATION FOR BREACH.** A seller cannot justify his refusal to deliver any more logs after receiving payment on the contract, on the ground that the buyer lost the mill soon afterwards through default under a conditional sale contract, thus leaving him in no position to perform, since if the seller had resumed delivery of logs, the owners of the mill might not have elected to forfeit the conditional sale contract. *Clements v. Cook.*..... 217
4. **SALES (95)—RIGHTS AND LIABILITIES BETWEEN PARTIES—DEFAULT IN PAYMENT—PASSING OF TITLE.** Default in the payment of \$150 boot money on trading a light for a heavy team of horses, does not prevent the passing of title, where there was an exchange of possession and credit was given for the payment. *Esmond v. Richards.*..... 641

Sales—Continued.

5. **SALES (103)—WARRANTY — BREACH — EVIDENCE — SUFFICIENCY.** An action on promissory notes given for the price of a new harvester to be shipped from the factory, and warranted to do good work, must fail for want of consideration and failure to deliver the machine, where it appears that the company sent from a neighbor's farm an old machine out of repair, with an expert to make it work, and who was unable to do so, and the contract was never consummated by acceptance of the order and the giving of a chattel mortgage as contemplated. *Gwinn v. Heydon*..... 664
6. **SAME (103).** In such a case, the fact that the prospective purchaser paid the wages of the expert after the first few days while trying to make the harvester work satisfactorily, does not show that the machine was delivered by the company. *Gwinn v. Heydon*.. 664
7. **SALES (105) — IMPLIED WARRANTY — SALE BY DEALER — LIABILITY.** A dealer selling an automobile of a particular model, of which he was known not to be the manufacturer, is not liable to the purchaser upon an implied warranty against latent defects which he could not have discovered by ordinary inspection and tests; his duty being fulfilled when he delivered a car of the particular model contracted for. *Hoyt v. Hainsworth Motor Co.*..... 440
8. **SAME (105)—IMPLIED WARRANTY—QUESTION FOR JURY.** As a general rule, an implied warranty is a presumption of fact and not of law, based upon the presumed intent of the parties, but where only one inference can be drawn from the undisputed facts, the question becomes one of law for the court. *Hoyt v. Hainsworth Motor Co.* 440
9. **SAME (115)—WARRANTY—BREACH—OPPORTUNITY TO REMEDY DEFECTS—WAIVER OF CONDITION.** In such a case, the requirement that the purchaser deliver the machine, if defective, at a certain place, is waived where the company, after notice of breach of the warranty, denied the breach and demanded payment, threatening suit to enforce the same. *Gwinn v. Heydon*..... 664
10. **SAME (118) — WARRANTY — BREACH — WAIVER BY FAILING TO GIVE NOTICE.** In such a case, the failure to give written notice to the company within six days as to the failure of the machine to do good work, as provided in the contract, so that an expert could be sent to remedy the defects, is not a waiver of the warranty, where the company had notice of the defects and its expert was already at work on the machine, and before the expiration of six days after the expert finished, the company brought suit on the note. *Gwinn v. Heydon*..... 664
11. **SALES (127) — ACTION FOR PRICE — DEFENSES — GOODS SOLD FOR ILLEGAL PURPOSE.** The fact that the vendor of liquor knew, or should have known, that it was purchased for the purpose of illegal sale in

Sales—Continued.

another state, does not bar an action on checks given for the purchase price, unless it was a part of the contract of sale that it should be so used or sold, or the vendor participated in the transaction otherwise than in the mere making of the sale. *Doonan v. Rossi* 150

Satisfaction:

See RELEASE.

Of mortgage debt, see MORTGAGES, 4, 5.

Schools and School Districts:

Liability of county for torts of school superintendent, see COUNTIES, 1.

1. SCHOOLS AND SCHOOL DISTRICTS (29-1)—NEGLIGENCE (6)—DANGEROUS ELEVATOR IN SCHOOL BUILDING—CARE AS TO EMPLOYEE OF LICENSEE. A school district is not liable for injury suffered by a twelve-year-old boy through the dangerous condition of an elevator used by him while employed by the manager of a lunch room in a high school building during the holding of a teachers' institute in charge of the county superintendent, since the superintendent was a mere licensee under Rem. Code, § 4481, granting permission to use the school room for certain public gatherings; and the boy being an employee of the licensee, was entitled to no greater rights in respect to the condition of the elevator. *Smith v. Seattle School District No. 1*..... 64

Seamen:

Jurisdiction of state courts over injuries to seamen, see ADMIRALTY.

1. SEAMEN (3)—INJURY TO SEAMEN—COURTS—CONCURRENT JURISDICTION. The rights of a seaman as to injuries resulting from unseaworthiness of the ship are the same under the rules of the common and the maritime law. *Sandanger v. Carlisle Packing Co.*..... 480

Secondary Evidence:

In civil actions, see EVIDENCE, 4, 5.

Seduction:

Comment on evidence by judge, see CRIMINAL LAW, 9.

1. SEDUCTION (7, 12)—ACTS CONSTITUTING OFFENSE—PROMISES OR INDUCEMENTS—INSTRUCTIONS. In a prosecution for seduction, it is proper to refuse an instruction that consent must have been secured by reason of some false promise or deceitful inducement, where the instruction was too narrow and another instruction with proper limitations required that there be some artifice, promise, inducement or wiles inducing the consent. *State v. Storrs*..... 675
2. SEDUCTION (8, 12) — PROMISE OF MARRIAGE — INSTRUCTIONS. In a prosecution for seduction by a married man, it is not error to refuse an instruction that there could be no reliance upon promises of mar-

Seduction—Continued.

riage after knowledge that accused was a married man, where promise of marriage was not the basis of the charge and it was plain from the evidence that there never was any reliance on such a promise. *State v. Storrs*..... 675

3. **SEDUCTION (9)—CRIMINAL RESPONSIBILITY — DEFENSES — OFFER TO MARRY—GOOD FAITH.** In a prosecution for seduction under Rem. Code, § 2441, providing for a stay of proceedings upon the accused's good faith offer of marriage, it is competent for the state to show that the female seduced had been acquitted of murder on the ground of insanity and was mentally incompetent to accept a proposal of marriage. *State v. Storrs*..... 675
4. **SAME (9) — DEFENSES — PREVIOUS CHASTE CHARACTER — INSTRUCTIONS.** In a prosecution for seduction of a woman of previous chaste character, prior acts of sexual intercourse with the accused cannot be shown to overcome the presumption of chastity. *State v. Storrs*..... 675
5. **SEDUCTION (11)—EVIDENCE—SUFFICIENCY.** A conviction of seduction is sufficiently sustained by evidence of attentions to a girl of eighteen which completely won her love before she learned that the accused was a married man and that she submitted her body to him only after they had become very intimate and had been constantly together, until she had become so madly in love with the accused as to make any sacrifice for him. *State v. Storrs*..... 675
6. **SAME (12)—PREVIOUS CHASTE CHARACTER — PRESUMPTIONS — BURDEN OF PROOF—INSTRUCTIONS.** In a prosecution for seduction, an instruction that the presumption of chastity must be overcome by proof of specific acts of prior sexual intercourse is proper, since unchastity cannot be shown by general reputation. *State v. Storrs*, 675

Self-Defense:

Defense in prosecution for homicide, see **HOMICIDE**.

Self-Serving Declarations:

See **EVIDENCE**, 7.

Servants:

See **MASTER AND SERVANT**.

Service:

Of notice of appeal, parties entitled, see **APPEAL AND ERROR**, 5, 6, 9.

Of notice to quit premises, see **LANDLORD AND TENANT**, 2-4.

Set-Off and Counterclaim:

Recovery of value of improvements in ejectment, see **EJECTMENT**.

Settlement:

See COMPROMISE AND SETTLEMENT; RELEASE.

Shipping:

Jurisdiction and proceedings in admiralty, see ADMIRALTY.

Injuries to seamen, see SEAMEN.

Signals:

Failure of driver to sound horn as proximate cause of injury, see MUNICIPAL CORPORATIONS, 10.

Signatures:

Requirements of statute of frauds, see FRAUDS, STATUTE OF, 3.

Of parties to contract, see SALES, 1.

Slaughter House:

As public nuisance, see NUISANCE.

Statement:

Of case or facts for purpose of review, see APPEAL AND ERROR, 11, 12.

Of injured person as part of *res gestae*, see CRIMINAL LAW, 6.

Opening statement of prosecuting attorney, see CRIMINAL LAW, 11.

By witness inconsistent with testimony, see WITNESSES, 2, 3.

States:

Creation of pest districts by county board as exercise of police power of state, see CONSTITUTIONAL LAW.

Power of city to condemn lands in other state for purpose of water supply, see EMINENT DOMAIN, 1, 2.

Taking property for state highways, see EMINENT DOMAIN, 3, 4, 6.

Statute of Frauds:

See FRAUDS, STATUTE OF.

Statutes:

See FRAUDS, STATUTE OF.

Adoption of child, see ADOPTION.

Providing for creation of pest districts, see AGRICULTURE.

Control and regulation of carriers, see CARRIERS, 1-3.

Filing claims against county, see COUNTIES, 2.

Invalidity of act fixing venue of offenses committed on route traversed by public carriers, see CRIMINAL LAW, 2.

Trial of offenses in justice courts, see CRIMINAL LAW, 4.

Improvements in ejectment, see EJECTMENT.

Exercise of power of eminent domain by city to obtain water supply, see EMINENT DOMAIN, 1, 2.

Condemnation of land for state highway, see EMINENT DOMAIN, 4, 6.

Operation of ferries, see FERRIES.

Statutes—Continued.

Laws defining bootlegger, see INTOXICATING LIQUORS.

Exempting employees of railroads from operation of workmen's compensation act, see MASTER AND SERVANT, 1.

City ordinances, see MUNICIPAL CORPORATIONS, 1.

Issuance and sale of bonds by municipality, see MUNICIPAL CORPORATIONS, 24.

Reduction of excessive tax, see TAXATION, 2.

Collateral inheritance tax, see TAXATION, 8-11.

Change of venue, see VENUE, 1.

Establishment of irrigation districts, see WATERS AND WATER COURSES, 4-8.

Stock:

Extent of stockholder's liability for debts of bank, see BANKS AND BANKING, 1-3.

Stockholders:

Extent of liability for debts of bank, see BANKS AND BANKING, 1-3.

Of insolvent bank, liability for interest, see INTEREST.

Stop, Look and Listen:

See STREET RAILROADS, 1.

Street Railroads:

1. STREET RAILROADS (19)—INJURY TO PERSON ON TRACKS—DUTY TO STOP, LOOK AND LISTEN. One entering upon the track of an inter-urban railway, the service of which was in the nature of a street car service, is not imperatively bound by the rule of "stop, look and listen," as when crossing or entering upon the tracks of a railway engaged in a through service where stops are made only at fixed stations. *Ziomko v. Puget Sound Elec. R.*..... 426
2. STREET RAILROADS (30) — COLLISION WITH AUTOMOBILE — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence of the driver of an auto truck struck by a street car is a question for the jury, where there was evidence that he attempted to cross the tracks at a street intersection after giving the proper signal and noticing an approaching car on the other track some 125 feet distant from the intersection, that the truck skidded and in attempting to stop the skidding he killed his engine and was struck by the approaching car, and that he had ample time to cross had his truck not skidded and the engine killed, and that the street car was a "one man car" and that the motorman was busy making change with a passenger at or shortly before the collision occurred. *Beeman v. Tacoma Railway & Power Co.*..... 164
3. STREET RAILROADS (30) — CONTRIBUTORY NEGLIGENCE — EVIDENCE — QUESTION FOR JURY. There was sufficient evidence to make a ques-

Street Railroads—Continued.

tion for the jury upon an issue as to whether an interurban train could have been stopped in time to avoid striking a vehicle, notwithstanding plaintiff's negligence, where it appears that the train was moving backwards slowly and could have been and was stopped within a few feet; that the conductor saw plaintiff and noticed his inattention and he attempted to warn plaintiff by means of a mouth whistle, but had means within his reach for stopping the train almost instantly, and which he used after the accident. *Ziomko v. Puget Sound Elec. R.*..... 426

4. SAME (30)—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether the driver of a vehicle upon a city street, struck by an interurban railway train was guilty of contributory negligence was a question for the jury, where it being necessary to turn to the left onto the tracks to pass around an automobile parked at the curb, he looked back when two hundred feet away and saw no train approaching, and later, upon starting to turn his horse, he looked again and saw a train running backwards and almost upon him, too late to avoid being struck, and the operators of the train had notice of his danger in time to have stopped, and no bell was rung or warning given of the approach of the train. *Ziomko v. Puget Sound Elec. R.*..... 426

5. SAME (33)—COLLISION AT CROSSING—DUTY OF MOTORMAN AND DRIVER—INSTRUCTIONS. In such a case, it was proper to instruct the jury that the driver, in approaching the crossing, had a right to presume that the motorman was keeping his car under such reasonable control as was commensurate with the situation at such point. *Beeman v. Tacoma Railway & Power Co.*..... 164

Streets:

See MUNICIPAL CORPORATIONS, 6, 7, 10-13, 15-17.

Subletting:

Contract for public improvement, see MUNICIPAL CORPORATIONS, 2-4.

Subrogation:

1. SUBROGATION (1)—SURETIES OR GUARANTORS. Where a co-guarantor of the debts of an insolvent corporation for the year 1914, died and his estate was compelled to pay in full the judgment recovered on the guaranty, the estate or its successor in interest might enforce contribution from the surviving guarantor; and hence is entitled to be subrogated to the rights of the judgment creditor in and to dividends from the bankrupt estate which had by agreement with the surviving guarantor been all applied upon an additional guaranty of the insolvent debts for the subsequent year to which the estate was not a party or liable thereon. *Fisher v. Schwabacher Hardware Co.*..... 240

Substantial Performance:

Of contract, see **CONTRACTS**, 3, 4.

Supersedeas:

On appeal or writ of error, see **APPEAL AND ERROR**, 10.

Support:

Custody and support of child on divorce, see **DIVORCE**.

Surface Waters:

See **WATERS AND WATER COURSES**, 1, 2.

Taxation:

Assessments for municipal improvements, see **MUNICIPAL CORPORATIONS**, 5-8.

1. **TAXATION (6)—SPECIAL ASSESSMENTS—BENEFITS TO PROPERTY.** The levying of special assessments on lands for benefits conferred, as an exercise of the taxing power, does not violate the constitutional requirements as to uniformity of levy or equality of taxation; but they must correspond in theory at least with the benefits conferred. *State ex rel. Stanger v. Bartlett*..... 299
2. **TAXATION (91)—ASSESSMENT—REDUCTION OF TAX—EQUALIZATION—POWERS OF BOARD—STATUTES.** An over-valuation of real estate through an excessive estimate of standing timber by the county assessor can be corrected by the board of equalization in the first instance without applying to the assessor to correct "manifest error," under Rem. Code, § 9200. *Stimson Timber Co. v. Mason County*.. 603
3. **SAME (141)—VACATION OF SALE—INADEQUACY OF PRICE.** Mere inadequacy of price is not ground for setting aside a tax sale. *National Bank of Commerce of Seattle v. Davies*..... 106
4. **TAXATION (154-1) — FORECLOSURE SALE — PUBLICATION OF NOTICE — DESCRIPTION OF PROPERTY.** A published notice of tax sale of the east half of a quarter section of land, describing the property as a quarter section and the number of acres to be sold, and referring to the tax number used in the assessor's tract book as provided by Rem. Code, § 9113, is sufficient, since the description, though incomplete, was supplied by the use of the tax number, which directed attention to the particular property of which he owned one-half the area described. *National Bank of Commerce of Seattle v. Davies*..... 106
5. **SAME (187) — TAX DEED — EXECUTION.** A tax deed is not prematurely executed although dated as of the last day for redemption, where it was not acknowledged or delivered until the next day. *National Bank of Commerce of Seattle v. Davies*..... 106
6. **TAXATION (206)—TAX DEED—ACTION TO SET ASIDE—LIMITATIONS.** The bar of the statute of limitations, Rem. Code, § 162, relating to actions to set aside tax deeds or for the recovery of lands sold for delinquent taxes, is not removed by the fact that a tax deed issued

Taxation—Continued.

on foreclosure by an individual holder of a certificate of delinquency, was in the form used in county foreclosure cases, the recitals as to the order of the county board authorizing the sale and as to ownership by the county being surplusage only. *Porter v. Burkley*.. 282

7. SAME (210)—ASSESSMENT — EXCESSIVENESS — EVIDENCE — SUFFICIENCY. A finding of over-valuation of timber lands is sufficiently sustained by evidence that the county cruise of saw timber thereon exceeded estimates made by several cruisers made for the owners to a much greater extent than the extreme percentage of permissible difference between cruises. *Stimson Timber Co. v. Mason County* 603
8. TAXATION (226) — INHERITANCE TAX — DEDUCTION OF DEBTS — NECESSITY OF ADMINISTRATION. Rem. Code, § 9182, providing that the deduction of debts of the estate in computing the inheritance tax shall not be made unless the same are allowed or established within the time provided by law unless otherwise ordered by the judge of the proper county, has no application where there was no administration of the estate, administration having been dispensed with by agreement between the creditors and heirs, who paid the debts within the time prescribed by the general statute of limitations. *In re Lambrecht's Estate*..... 645
9. SAME (226)—INTEREST ON TAX—STATUTES. An inheritance tax, which is not paid within fifteen months from the date of the testator's death draws interest from that date, under Rem. Code, § 9182, providing that the inheritance tax shall draw lawful interest until paid and shall be a lien on the estate from the death of the testator, and *Id.*, § 9192, providing that all taxes not paid within fifteen months from the death of the testator shall draw interest at the legal rate until paid. *In re Lambrecht's Estate*..... 645
10. TAXATION (229)—INHERITANCE TAX—COMPUTATION—DEDUCTION OF FAMILY ALLOWANCE. In the computation of the inheritance tax, \$1,000 is deductible from the estate as a family allowance, as expressly provided by Laws of 1917, p. 593, § 1, notwithstanding the executors were acting under a nonintervention will which made no provision therefor; in view of the wide scope of the authority of such executors under Laws of 1917, p. 642, § 93, and the fact that the law authorizes the allowance for the welfare of the family as if the testator himself had made the provision. *In re Ferrel's Estate*..... 231
11. SAME (229)—EXEMPTIONS FROM TAX — STATUTES — CONSTRUCTION. Laws of 1917, p. 196, amending Rem. & Bal. Code, § 9183, and providing for an inheritance tax of one per cent of the value of estates not exceeding \$50,000, if passing to a wife or lineal descendant, provided that, in such case, \$10,000 of the net value of any estate shall be exempt from such tax, must be construed as meaning that one exemption of \$10,000 should be allowed, and not as many as there are heirs or legatees, if more than one. *In re Ferrel's Estate*.... 231

Taxation of Costs:

See COSTS, 2.

Threats:

Evidence of threats by third persons, see EVIDENCE, 2.

Timber:

Excessive taxation of timber lands, see TAXATION, 2, 7.

Time:

For taking appeal or suing out writ of error, see APPEAL AND ERROR, 1, 7.

For motion for new trial, see APPEAL AND ERROR, 8.

For recording chattel mortgage, see CHATTEL MORTGAGES, 3.

For filing cost bill, see COSTS, 2.

For payment of interest, see INTEREST.

For entry of judgment, see JUDGMENT, 1.

For service of notice to quit premises, see LANDLORD AND TENANT, 3.

For execution of tax deed, see TAXATION, 5.

Failure to fix time and place of statements to impeach witness, see WITNESSES, 2, 3.

Title:

By adverse possession, see ADVERSE POSSESSION.

To real estate, see ALIENS.

To draft deposited for collection, see BANKS AND BANKING, 4.

Transfer of title on sale of goods, see SALES, 4.

To growing crops, see VENDOR AND PURCHASER, 1.

Failure of vendor to convey title, see VENDOR AND PURCHASER, 3.

Torts:

See NUISANCE.

Jurisdiction in admiralty, see ADMIRALTY.

Liability of county for torts of officers or agents, see COUNTIES, 1.

Measure of damages, see DAMAGES, 1, 4-8.

Fraud in sale of property, see FRAUD.

Of police officers, see MUNICIPAL CORPORATIONS, 14.

Release of one of several joint tort feorsors as release of all, see RELEASE, 1.

Liability of school districts for injuries to children, see SCHOOLS AND SCHOOL DISTRICTS.

Injuries caused by operation of street cars, see STREET RAILROADS.

Obstruction of waters of stream by bridge pier, see WATERS AND WATER COURSES, 2.

Treaties:

Effect of treaties on rights of aliens to hold real estate, see ALIENS, 2.

Trial:

Necessity for exceptions or objections in lower court, see **APPEAL AND ERROR**, 2-4.

Review of rulings as dependent on presentation of same by record, see **APPEAL AND ERROR**, 11, 12.

Review of rulings involving discretion of court, see **APPEAL AND ERROR**, 14, 15.

Review of findings in trial by court, see **APPEAL AND ERROR**, 18-20.

Review of rulings as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 21-29.

Instructions as to performance of contract, see **CONTRACTS**, 4.

Criminal prosecutions, see **CRIMINAL LAW**; **HOMICIDE**.

Right to trial by jury of vicinage, see **CRIMINAL LAW**, 1, 2.

Instructions as to modification of written contract, see **FRAUDS, STATUTE OF**, 7.

Right to trial by jury, see **JURY**, 1.

Competency of and challenge to jurors, see **JURY**, 2.

Instructions as to proximate cause of injury in city street, see **MUNICIPAL CORPORATIONS**, 13.

Motions and grounds for new trial, see **NEW TRIAL**.

Instructions in criminal action, see **SEDUCTION**, 1, 2, 6.

Instructions as to duties of motorman and driver of auto, see **STREET RAILROADS**, 5.

Place of trial, see **VENUE**.

Competency and examination of witnesses, see **WITNESSES**.

1. **TRIAL (20)—RECEPTION OF EVIDENCE—OFFER OF PROOF.** Defendant's statement as to what he intended to do with a rented house after his tenant moved out is not inconsistent with the fact that the house was rented for a year, and hence an offer to prove the same to corroborate his denial of such statement is properly overruled. *Van Delinder v. Richmond*..... 191
2. **TRIAL (24)—RECEPTION OF EVIDENCE—CUMULATIVE EVIDENCE.** The rejection of cumulative evidence is discretionary with the trial court. *Sound Timber Co. v. Danaher Lumber Co.*..... 314
3. **TRIAL (29)—RECEPTION OF EVIDENCE—REBUTTAL.** In an action by one timber company against another for damages from fire upon an issue made that the fire was set out by members of the I. W. W., some of whom made threats, evidence offered by plaintiff on rebuttal that at least one I. W. W. stated that they desired to avoid fires is properly excluded, since it did not tend to dispute defendant's testimony. *Sound Timber Co. v. Danaher Lumber Co.*..... 314
4. **TRIAL (32)—REOPENING CASE—DISCRETION.** The denial of an application to reopen the case for further evidence is not an abuse of discretion, where the evidence tendered would not have changed the result. *Howatt v. Clark*..... 137

Trial—Continued.

5. TRIAL (88)—INSTRUCTIONS—CONFUSING OR MISLEADING INSTRUCTIONS. Written instructions telling the jury to disregard statements made by the court during the trial as to the law applicable to the issues, and that the written instructions contained all the law the jury were at liberty to consider, are not objectionable as tending to confuse the jury and cause them to feel at liberty to consider testimony that had been stricken out, another portion of the instructions having told the jury to disregard all evidence stricken out by the court. *Sound Timber Co. v. Danaher Lumber Co.*..... 314
6. TRIAL (97)—INSTRUCTIONS—MATTERS NOT SUSTAINED BY EVIDENCE. In an action for personal injuries, it is not error for the court to recite, in a statement of the issues, the substance of the allegations of the complaint and the items of damage alleged to have been suffered by reason of the injury, though certain of the items were unsupported by evidence, where no request was made to enumerate the items which no evidence had been offered to sustain. *Ziomko v. Puget Sound Elec. R.*..... 426
7. TRIAL (101)—INSTRUCTIONS—REQUESTS. It is not error to refuse requested instructions which, so far as material, were embodied in the instructions given. *Seal v. Long*..... 370
8. TRIAL (101)—INSTRUCTIONS—REQUESTS. The refusal to give requested instructions which could have been properly given is not error, where their substance, so far as material, was embodied in the instructions given by the court. *Ziomko v. Puget Sound Elec. R.* 426
9. SAME (118)—MISCONDUCT OF JUROR—COMMUNICATING WITH WITNESS. The conduct of a juror in questioning a witness as to defendant's nationality, and stating that another member of the jury thought she was German, during a recess of the court, while censurable, is not ground for a new trial in that it showed prejudice against the defendants, since it was probably prompted by no other motive than curiosity. *Carlisle v. Hargreaves*..... 383
10. TRIAL (121)—MISCONDUCT OF JURY—QUOTIENT VERDICT. A new trial will not be granted for misconduct of the jury in taking a quotient verdict, where the affidavits show that they did determine by that process what the average of the amounts each juror voted to award plaintiff would be, but that the ultimate amount awarded was not made in compliance with any previous agreement entered into between them upon their consideration of the case. *Carlisle v. Hargreaves* 383

Trover and Conversion:

Wrongful delivery of goods by carrier, see CARRIERS, 5, 8.

Undue Influence:

Procuring making of will, see **WILLS**, 2.

Uniformity:

Of taxes, see **TAXATION**, 1.

Unlawful Detainer:

See **LANDLORD AND TENANT**, 2, 4.

Usury:

1. **USURY (11)—WHAT CONSTITUTES—AGREEMENT FOR SERVICES TO BE RENDERED BY LENDER.** A charge of \$1,000 for a loan of \$2,250, which was included in notes of the borrower and was to bear interest, is an usurious transaction, although the parties signed an instrument which provided for services to be rendered by the lender, such contract being indefinite as to time and kind of services rendered, and it appeared that the services actually rendered were of no practical value and that the agreement amounted merely to a shift or device to cover illegal interest on money loaned. *Robinson, Thieme & Morris v. Whittier*..... 6

Vacation:

Of judgment, see **JUDGMENT**, 1.

Tax sale, see **TAXATION**, 3, 6.

Value:

Of attorney's services, see **ATTORNEY AND CLIENT**.

Opinion evidence as to value of property, see **EVIDENCE**, 9.

Damages for value of use of property detained, see **REPLEVIN**, 1, 3.

Variance:

Between pleading and proof in civil actions, see **PLEADING**, 4.

Vehicles:

Care in management of vehicle on highway, see **HIGHWAYS**.

Vendor and Purchaser:

Property conveyed by deed, see **DEEDS**.

Right to condemnation money as between vendor and purchaser, see **EMINENT DOMAIN**, 5.

Sale of property of minor by guardian, see **GUARDIAN AND WARD**, 2.

Transfer of mortgaged property, see **MORTGAGES**, 3, 4.

Transfer of ownership of personal property, see **SALES**.

Right to use of water system as appurtenance, see **WATERS AND WATER COURSES**, 3.

1. **VENDOR AND PURCHASER (30)—CONTRACT—CONSTRUCTION—SUBJECT-MATTER—TITLE TO CROPS.** A vendee is entitled to crops growing on

Vendor and Purchaser—Continued.

lands purchased in January under a contract providing that title would be given within thirty days from acceptance of the contract and receipt of first payment with a crop mortgage as security, the vendor stating that he would not be surprised if the purchaser realized the full price of the land from the crop. *McCarty v. California Farms Co.*..... 337

2. **VENDOR AND PURCHASER (160)—REMEDIES OF PURCHASER—RECOVERY OF PRICE—FAILURE OF TITLE.** The vendor's breach of the contract through inability to convey title by reason of the condemnation of the property for the uses of the government, constitutes a complete failure of consideration, entitling the vendee to recover all sums paid by him on the contract. *Schaefer v. Gregory Co.*..... 408
3. **SAME (182)—BREACH OF CONTRACT—FAILURE TO CONVEY TITLE—DAMAGES.** Where the vendor refused to convey title merely for the purpose of obtaining the crop then growing upon the land, the vendee was entitled to recover his actual damages as measured by the difference between the contract price of the land and its value as enhanced by the crop, together with the money paid on the contract and his expenses. *McCarty v. California Farms Co.*..... 337

Venue:

Criminal prosecution, see **CRIMINAL LAW**, 1, 2.

1. **VENUE (18)—CHANGE—PREJUDICE OF JUDGE—CONTEMPT—STATUTES—CONSTRUCTION.** A prosecution for constructive contempt committed out of the presence of the court, is a proceeding within Rem. Code, § 209-1, in which defendant is entitled to a change of venue upon applying therefor upon his first appearance to answer to the charge. *State ex rel. Cody v. Superior Court.*..... 571
2. **VENUE (22)—CHANGE—APPLICATION—HEARING AND DETERMINATION—AMENDMENT OF COMPLAINT—POWERS OF COURT.** Where the original complaint in an action for malicious prosecution stated a transitory action and defendant moved for a change of venue to the county of his residence, it is proper to permit the plaintiff to amend his complaint to show that the action was against a public officer for acts done in virtue of his office which, by Rem. Code, § 205, must be tried in the county where the cause arose, and in which the action was brought, thereby working a denial of defendant's motion for a change of venue. *State ex rel. McWhorter v. Superior Court.*..... 574

Verdict:

Review on appeal, see **APPEAL AND ERROR**, 16, 17.

Inadequate or excessive damages, see **DAMAGES**, 4-8.

Excessiveness, remission or grant of new trial, see **NEW TRIAL**, 4.

In civil actions, see **TRIAL**, 10.

Voters:

Submission to voters of plan proposed for public improvement, see MUNICIPAL CORPORATIONS, 1.

Submission to of question of issuing bonds, see MUNICIPAL CORPORATIONS, 21-24.

Waiver:

See ESTOPPEL.

Of proofs of loss, see INSURANCE.

Of notice to quit premises, see LANDLORD AND TENANT, 4.

By vendor of conditions of contract, see SALES, 9.

Of warranty by purchaser, see SALES, 10.

Warranty:

On sale of goods, see SALES, 5-10.

Waters and Water Courses:

Power of city to acquire lands in other state for purpose of water supply, see EMINENT DOMAIN, 1, 2.

Issuance of bonds in payment for construction of water works, see MUNICIPAL CORPORATIONS, 18-24.

1. WATERS (55)—SURFACE WATERS—LIABILITY. Water escaping from the banks of a river at times of flood are surface waters which an owner may lawfully protect against by embankments, even though the effect is to cast the increased flow upon other lands. *Morton v. Hines*..... 612
2. WATERS (55, 56)—OBSTRUCTIONS—SURFACE WATERS—FLOODS—EVIDENCE OF DEFLECTION—SUFFICIENCY. A bridge pier is not shown to have been the cause of overflowing the left bank of the stream in the time of an unusual freshet, where the angle of the pier was shown to have a tendency to deflect the water to the other bank, the river turned sharply to the right below the bridge, naturally tending to deflect the current to the left bank, and the freshet was the highest known in sixteen years, and inundated both banks for great distances both above and below the bridge. *Morton v. Hines*..612
3. WATERS AND WATER COURSES (65)—CONVEYANCES—RIGHTS APPURTENANT TO OTHER ESTATE. Purchasers of lots supplied by a water system installed by the vendor and necessary to the enjoyment of the property cannot claim a free right to the continual flow of the water through the servient premises as an appurtenance, where a greater part of the system did not exist at the time of the conveyances, and the water did not run freely and without control, since the vendor had placed shut-offs at the property lines, thereby expressing its control and ownership in the water. *Hurley v. Liberty Lake Co.*..... 207

Waters and Water Courses—Continued.

4. **WATERS AND WATER COURSES (89)—IRRIGATION DISTRICTS—ESTABLISHMENT—ESTIMATE OF COST—STATUTES.** Bonds of an irrigation district are not invalid for failure of the board of directors to sufficiently comply with Rem. Code, § 6430, requiring the board to "estimate and determine the amount of money to be raised" before calling an election for the issuance of bonds, where the estimate of the cost of the project was made upon information obtained through investigation and surveys made by a competent engineer appointed by the board, whose work was checked over and approved by engineers and attorneys appointed for that purpose, since the statutes vest the board of directors with large discretion, and contemplate that they shall have before them such information as will enable them to make a fair, honest and reasonably accurate estimate. *Board of Directors, Horse Heaven Irr. Dist. v. Mineah*..... 325
5. **SAME (89)—PROCEEDINGS TO ESTABLISH—POWERS OF OFFICERS—STATUTES.** The board of directors of an irrigation district have authority to purchase from an irrigation company its surveys, notes, water rights, etc., and to pay for the property by the delivery of bonds of the district, under Rem. Code, § 6427, and the discretion of the board in making the purchase will not be questioned, in the absence of arbitrary conduct or fraud. *Board of Directors, Horse Heaven Irr. Dist. v. Mineah*..... 325
6. **SAME (91)—BONDS—ISSUANCE AND DELIVERY—EFFECT OF ANTEDATING—INTEREST ON BONDS.** Bonds of an irrigation district dated January 1, 1918, but not issued and delivered until January 25, 1918, are not void because ante-dated and in violation of Rem. Code, § 6430, requiring that they shall "bear date at the time of their issuance"; since "date of issue" when applied to notes, bonds, etc., of a series, means the date fixed as the beginning of the term for which they run, without reference to the time of their sale or delivery, the testimony showing that the accrued interest was adjusted at the time of their sale and delivery. *Board of Directors, Horse Heaven Irr. Dist. v. Mineah* 325
7. **SAME (91)—BONDS—VALIDITY—PLACE OF PAYMENT—DESIGNATION IN BONDS.** Rem. Code, § 6430, requiring that the principal and interest of irrigation district bonds "shall be payable at the place designated therein," does not prevent the board of directors from designating more than one place for payment, such being the general custom when issuing bonds, and greatly enhancing their value because of the convenience to buyers. *Board of Directors, Horse Heaven Irr. Dist. v. Mineah*..... 325
8. **SAME.** Such designation in the bonds, making them payable outside the district, does not violate Const., art. 11, § 15, providing

Waters and Water Courses—Continued.

that "all moneys of any public or municipal corporation shall be deposited with the treasurer, or other legal dispositive, to the credit of the city, town or other corporation"; since if the directors exceeded their powers, the buyers must be held charged with the knowledge thereof, and the provision, in that event, would be merely surplusage and not affect the validity of the bonds. *Board of Directors, Horse Heaven Irr. Dist. v. Mineah*..... 325

Ways:

Private rights of way, see EASEMENTS.

Wills:

Legacy and succession taxes, see TAXATION, 8-11.

1. WILLS (17)—VALIDITY—DRAFTING OF WILL BY BENEFICIARY. The drafting of a will by a beneficiary thereunder does not in itself defeat the bequest, where there is no showing of undue influence and the evidence is clear and unequivocal that the will as written was as the testator desired it. *In re Adin's Estate*..... 379
2. WILLS (20)—VALIDITY—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY. There is no showing that a bequest to an attorney who drafted a will was induced by undue influence, where, after writing a letter in which the testator expressed a desire to give most of his property to the attorney, he was advised not to do so, but to think the matter over, and if he then desired to make a bequest, a smaller amount would be acceptable; that the will was later drafted by the attorney and contained a bequest to him in smaller amount than indicated in the letter, after which it was read and explained to the testator, who stated that it was correct. *In re Adin's Estate*..... 379
3. SAME (38)—CONTESTS—BURDEN OF PROOF. Upon the contest of a will which has been admitted to probate, the burden of proof is upon the contestants to establish every material fact alleged. *In re Adin's Estate*..... 379
4. WILLS (74)—CONSTRUCTION OF POWERS—"DEBTS"—PAYMENT. Under a will requiring payment of the testator's debts within six months, in which the testator showed special concern as to bequests of income "for a period of fifteen years from and after my death," a mortgage indebtedness of \$80,000 upon the real estate was not a "debt" to be paid from income, or within six months, where it did not mature until long after that period and had not been assumed so as to be a personal liability, and the income was much too small to pay it off within six months. *Davis v. Brown*..... 121

Witnesses:

Review of rulings involving discretion of court, see APPEAL AND ERROR, 14.

Witnesses—Continued.

Experts, see CRIMINAL LAW, 8.

Right of accused to interview witness, see CRIMINAL LAW, 10.

Opinions of experts, see EVIDENCE, 9.

Conduct in examination of as ground for new trial, see NEW TRIAL, 2.

1. WITNESSES (78, 81)—CROSS-EXAMINATION—LIMITATION — IMMATERIAL MATTERS. It is proper to sustain objections to questions on cross-examination which touched matters foreign to those brought out on direct examination and were immaterial. *Sound Timber Co. v. Danaher Lumber Co.*..... 314
2. SAME (120)—IMPEACHMENT—TIME AND PLACE OF STATEMENT. Failure to fix the time and place of a conversation which a witness denied having had on cross-examination, does not prevent evidence of the occurrence of the conversation to impeach the witness, where the witness denied ever talking with the person in question. *Sound Timber Co. v. Danaher Lumber Co.*..... 314
3. WITNESSES (122) — IMPEACHMENT — INCONSISTENT STATEMENTS. Where plaintiff's witness denied, on cross-examination, having a conversation with a third person in which he made a statement conflicting with his present testimony, it was proper to allow such third person to testify that the conversation occurred at a certain time and place, since it tended to contradict his present version of the matter. *Sound Timber Co. v. Danaher Lumber Co.*..... 314

Workmen's Compensation Act:

See MASTER AND SERVANT, 1.

Writings:

Secondary evidence of contents, see EVIDENCE, 4, 5.

Parol evidence to vary writings, see EVIDENCE, 8.

Requirements of statute of frauds, see FRAUDS, STATUTE OF.

Writs:

See GARNISHMENT; HABEAS CORPUS; INJUNCTION; PROHIBITION; REPLEVIN.

Year:

Agreements not to be performed within one year, see FRAUDS, STATUTE OF, 1.

Ex. J. H. L.
4/17/21

